

The Contractual Legalities of Buying and Selling on eBay: Online Auctions and the Protection of Consumers

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Abstract

The precise content and scope of contract law governing the buying and the selling of goods on eBay have long been a cause for considerable concern — particularly for online users of eBay. The rise in the use of online auctions has presented the law with a number of interesting challenges in consumer protection. Clearly, there is a mismatch and fundamental discrepancy between the operation of online ‘auction’ sites, such as eBay, and conventional law as articulated in common law contract casebooks. This article examines the legal position of individual online auction users in Australia (buyers and sellers) and focuses on the potential risks, liabilities and obligations users may face. Very little academic attention has, so far, been paid in Australia to the legal processes and issues relating to the use of online auction sites such as eBay. It is, therefore, timely and appropriate that the issue be examined in detail and the law relating to online auction processes be clarified.

This article examines whether current law sufficiently protects Australian consumers who utilise online auctions and whether additional legislative regulatory intervention is required. The paper then looks at some judicial decisions made in Australia and overseas which have addressed the precise legal construction of eBay and its attendant responsibility to online consumers. Finally, the paper concludes that better enforcement of consumer rights is vital for online auctions.

1. Introduction

Consumer transactions undertaken on eBay constitute an essentially online and dynamic form of ‘auction’ process.¹ In particular, what happens on eBay is that an item is listed for sale with a reserve price and prospective or aspiring purchasers make their respective bids. The item listed for sale is then ‘sold’ to the highest bidder provided the reserve price is met.

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¹ eBay is one of the largest consumer-oriented auction sites and one of the largest market places in the world. According to a survey conducted by ACNielsen International Research 2005, an estimated 724,000 Americans report eBay as a primary or secondary source of income, see D Lucking-Reiley et al, ‘Pennies from eBay: The Determinants of Price in Online Auctions’ (2007) 55(2) *Journal of Industrial Economics* 223, 224.

'Online' forms of auction, such as eBay, are not new phenomena and have, indeed, operated on the internet for some time now. The increasing use of the internet as an electronic source of information and as a tool for undertaking financial transactions has, of course, had ramifications and flow-on effects for online auction processes, such as eBay, with their usage showing a marked increase in recent years. In particular, on eBay usage reported 192.9 million registered users globally as of 31 March 2006 and 75.4 million 'active' users in that particular March quarter.² In 2004, eBay had conducted over \$34.2 billion worth of transactions and a total of 56.1 million users either bid or listed an item on eBay during that year.³ The revenue and profits flowing from eBay have been equally significant. In the year 2006, eBay earned US\$ 6 billion net revenue as a consequence of the contributions made by its 221.6 million registered users.⁴ Indicating its capacity to facilitate significant commercial activity, it has been reported that one computer is sold every 90 seconds and 1900 laptops are sold every day on eBay.⁵ The scope of commercial activity has not, however, been simply limited to enhancing sales of electronic equipment. It has been reported that after ten years of operation, eBay has created an entire new industry of commercial activity whereby more than 30 million sellers and buyers exchange merchandise with a value of more than \$20 billion annually.⁶ In effect, eBay has created its own industry, recording the making of US\$23 billion in annual transactions which, in turn, had the consequence of an estimated 400 000 people making their living exclusively through the use of online auction sites such as eBay.⁷

In a specifically local context, eBay is enormously popular in Australia. More than 4.4 million people visited eBay Australia's site

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- 2 W Eazel, 'eBay Claims 200 Million Users', <<http://www.vnunet.com/vnunet/news/2158241/eBay-signs-200m-users>> (accessed 12 August 2008).
 - 3 D Lucking-Reiley et al, above n 1, 224.
 - 4 See, 'eBay Inc. Announces Fourth Quarter And Full Year 2006 Financial Results', <<http://files.shareholder.com/downloads/eBay/116583043x0x69405/2cbacae7-15cf-46fb-9a19-a89664d4e591/eBayIncEarningsReleaseQ42006.pdf>> (accessed 21 December 2008).
 - 5 H H Li and C J Navarrete, 'E-auctions: Impact of Network Externalities on Sellers' Behavior' (Proceedings of the Eleventh Americas Conference on Information Systems, Omaha, NE, USA August 11-14, 2005).
 - 6 Ibid.
 - 7 Pan-Western E-Business Team, 'E-Business Connection', <<http://www.e-bc.ca/pages/resources/internet-auctions.php>> (accessed 22 October 2008).

in March 2006 alone.⁸ The online auction process is a well-known business paradigm in Australia which online consumers have been more than happy to exploit in order to generate profits for themselves. It has been suggested by some academic commentators that online auctions are one of the most successful forms of electronic commerce now operating in Australia.⁹

The difficulty, however, has been that the legal regulatory frameworks and trade practices law enforcement agencies, as well as associated consumer bodies, have failed to keep pace with the increasing utilisation and consequent commercial growth of online auction sites, such as eBay. As a consequence, a mismatch has arisen between the actual operation of online auction sites and the laws and associated regulatory bodies applicable to this medium of trade and commerce. The result of this has been the increasing prevalence of significant fraudulent activities on internet auction sites. In particular, this has been due to the difficulties associated with the anonymity of users and the imbalance of information — ‘information asymmetry’ — whereby some users have greater access to information than do others. The most common offences are, firstly, ones relating to the actual or non-performance of the transactions — vendors, for example, failing to deliver advertised goods as contracted. A related offence relates to the failure to deliver the goods ‘as advertised’, thereby engaging in misrepresentation and false and misleading or deceptive conduct. A further offence is associated with the delivery of goods which are of less value than those which were advertised — exposing the vendor to liability under s 52 of the *Trade Practices Act 1974* (Cth) (‘the TPA’), or equivalent provision under the relevant states’ *Sale of Goods Acts*. An additional offence relates to failing to deliver the goods in a timely way, while a final common offence deals with failing to disclose all relevant information about the product or the terms of sale. Another growing difficulty relates to the sale of fake goods and the growing number of scams.¹⁰

The issue dealt with here is whether these transactions constitute legally enforceable or binding contracts under contract law and

8 N Moustakas, *Going, Going, Gone: Online Auctions, Consumers & the Law* (2006) Executive summary.

9 P Bajari and A Hortacsu, ‘Economic Insights from Internet Auctions’ (2004) 42 (2) *Journal of Economics Literature* 457, 457.

10 Internet scams fraud trends published by the Internet Fraud Watch Information Centre in the USA, for January to December 2005, show that auctions complaints for goods being never delivered or misrepresented topped the rankings with 42% of complaints and an average loss of \$1,155. See C Riefa, ‘“To Be or Not to Be an Auctioneer?” Some Thoughts on the Legal Nature of Online “eBay” Auctions and the Protection of Consumers’ (2008) 31 *Journal of Consumer Policy* 167, 168.

statute. However, we are, of course, cognisant of the fact that each transaction must be judged individually according to its particular facts and that the decision, then, is ultimately one to be adjudicated by the courts. Nonetheless, for the purposes of consistency, we advocate that the common law of contract — as well as those provisions located in consumer protection legislation, such as the *Trade Practices Act* and the various states' *Sale of Goods Acts* — be extended in their application to include relating to online auction processes. It is imperative that consumers have assurance in the domain of online auctions, including all the statutory and common law forms of protection accorded to purchasers in normal sale of goods transactions — if only to enhance consumer and public confidence in online sales processes.

This paper thus discusses the legal difficulties, for both vendors and purchasers, associated with undertaking sale of goods transactions on eBay. In doing this, it also suggests alternative strategies and methods that vendors and purchasers can use online to protect their interests and avoid some of the common pitfalls and traps into which users of electronic media may fall. The paper also examines whether current law sufficiently protects Australian consumers who utilise online auctions and whether additional legislative regulatory intervention is required. It then looks at some judicial decisions made in Australia and overseas which have addressed the precise legal construction of eBay and its attendant responsibility to online consumers. This paper finally concludes that better enforcement of consumer rights is vital for online consumers.

2. *Is eBay an Auctioneer?*

The first issue to be addressed is whether the eBay system constitutes an 'auction' for the purposes of contract law and, as a corollary to this, whether eBay itself is, indeed, an auctioneer.

Essentially, eBay is an extremely flexible venue or electronic medium where buyers and sellers may trade, which allows them to offer, sell or buy any product, at any time, from anywhere, in a variety of formats.¹¹ In eBay auctions, both sellers and buyers must register themselves on eBay.¹² Generally, the seller has to decide, firstly, how

11 See eBay User Agreement, <<http://pages.ebay.com/help/policies/user-agreement.html>> (accessed 21 September 2008).

12 Though eBay takes care to call itself a 'trading community', it is safe to say that many of its 19 million registered users and its competitors think of eBay as an auctioneer. After all, the company provides the technology to run thousands of auctions everyday, sends users notices about bids they've placed and deletes illegal auctions hawking everything from kidneys to guns. Unlike an offline auction house, though, eBay holds no inventory, does not generally have products assessed for authenticity and does not handle money from sales. See J

long the item will be on sale on eBay and, secondly, the minimum acceptable amount for any bid. The wider online public who are interested in buying the listed product may then commence bidding for the item.¹³ An initial bidder must bid at or above the reserve price. Obviously, subsequent bidders must offer higher bids. After the expiry of the stated time period, the person (buyer) with the maximum bid is entitled to purchase the item at the price they have offered. After receiving the payment from the successful bidder, the seller must make arrangements for delivering the item.

Despite the fact that online auctions are similar to traditional auctions in many respects,¹⁴ they are not subject to the same regulatory legal framework as normal contracts for the sale of goods in a traditional auction. In a traditional auction, it is the bidders who make offers and the auctioneers who collect the payments, distribute auctioned goods, act as an agent on the vendor's behalf, and then obtain the best possible price for the item by rejecting or accepting bids on their behalf. The auctioneer, as agent, further collects payment for the item which is then passed onto the seller with the auctioneer receiving a fee for his or her services. Because of its distinctively online nature and its electronic medium, eBay, however, displays none of these processes.¹⁵ For example, in an online auction process, eBay, as auctioneer, never takes physical or actual possession of the relevant item, but it provides only the electronic platform or medium for the transaction. Further, eBay, as the auctioneer, does not physically deal with the bids, nor does it collect money, with the item being passed directly from the vendor to the buyer.¹⁶ In effect, eBay charges a fee only to list the items and oversee bidding on behalf of the sellers.

Couzin, 'Analysis: eBay Fraud Lawsuit Raises Questions' *CNN.com*, <<http://archives.cnn.com/2000/TECH/computing/11/07/suing.ebay.idg/>> (accessed 21 August 2008).

13 D Lucking-Reiley, 'Auctions on the Internet: What's Being Auctioned, and How?' (2000) 48(3) *Journal of Industrial Economics* 227, 237.

14 *Ibid.*

15 One of the disadvantages of this is that in online auctions, less information is available for online bidders. In contrast, '[i]n a live auction, bidders inspect the item at the preview (in the case of art auctions) can get advice from the auction-house experts present. In an online auction, bidders get only what information is posted on a webpage. The fuzziness of pictures on a computer screen means an online bidder's information is limited.' See E Kazumori and J McMillan, 'Selling Online Versus Live' (2005) 53(4) *Journal of Industrial Economics* 543, 544.

16 C Paluf, 'Redefining the Auction', <<http://www.buzzle.com/editorials/8-14-2006-105431.asp>> (accessed 22 August 2008); see also, S Klein, 'Introduction to electronic auctions' (1997) (7) *Electronic Markets* 3.

Another significant difference between eBay and the traditional auction process involves the crucial issue of timing. For example, most online auctions are conducted over a certain period of time — a few days, a week or a designated time — which assists the bidder who does not have to be constantly vigilant or even to be online at the close of the auction.¹⁷ In contrast, traditional auctions do not vary in length and are likely to retain the attention of bidders for the entire duration.¹⁸

Furthermore, in traditional auctions, all buyers and sellers are in one place and the auction continues as long as participants are actively bidding.¹⁹ It is argued that,

unlike traditional auctions, where the parties or their representatives are in the room with the offered merchandise, online auction sites use the internet to conduct a virtual auction where the parties never meet and the buyer has no opportunity to examine the offered goods.²⁰

Another difference between traditional and online auctions is that the latter usually asks the bidders to submit maximum bids (called 'proxy bids') in which bidders have to submit a maximum bid which allows the online system itself to place bids on their behalf. Online, the highest bid will be kept confidential from other users, which is not the convention undertaken at traditional auctions. An unfortunate by-product of this anonymity is that it may cause problems for consumer protection and, more problematically, can facilitate *essentially undetectable* fraudulent conduct. As an indication of the fraudulent activities which it perpetuates, eBay itself has claimed that one-tenth of one percent of all transactions have been associated with complaints of fraudulent conduct to the relevant regulatory agency.²¹

17 In particular, 48% of the auctions were seven days in length, 28% of the auctions have length of five days and only about 9% were the maximum length of 10 days, with the remaining 15% of auctions having the minimum three-day length. See D Lucking-Reiley et al, above n 1, 226; see also A Ockenfels and A E Roth, 'The Timing of Bids in Internet Auctions: Market Design, Bidder Behavior, and Artificial Agents' (2002) *AI Magazine* 79.

18 J H Gilkeson and K Reynolds, 'Determinants of Internet Auction Success and Closing Price: An Exploratory Study' (2003) 20(6) *Psychology & Marketing* 537; see also, S G Ward and J M Clark, 'Bidding Behavior in On-line Auctions: An Examination of the eBay Pokemon Card Market' (2002) 6(4) *International Journal of Electronic Commerce* 139.

19 Ibid.

20 Miriam R Albert, 'E-buyer Beware: Why Online Auction Fraud Should Be Regulated' (2002) 39(4) *American Business Law Journal* 575, 582.

21 W Jyun-Cheng and C Chiu, 'Detecting Online Auction Inflated-Reputation Behaviors Using Social Network Analysis' (2005),

The anonymity of sellers is the most significant issue of concern and difference between eBay and online auction processes compared with traditional auctions. Put simply, in online auction processes real names are never revealed. Moreover, most of the auction sites identify sellers or bidders by email addresses — which, in turn, may produce a further lack of trust and confidence. In a traditional face-to-face environment, eye contact, a handshake and chatting may assist in facilitating a climate of basic trust between vendors and customers.²²

Furthermore, the fact that the sheer volume of turnover within online auctions is many times greater than that of traditional auctions is also a cause for concern. In brief, buyers cannot physically inspect items even though the quality of an item may be unsatisfactory and the item may be one that does not correspond to its sales description — contravening the applicable *Trade Practices Act* or states' *Sale of Goods Acts*.

Finally, the 'borderless' nature of the online world has raised a major challenge to traditional consumer protection paradigms which were constructed within physical boundaries.²³ What legal jurisdiction, for example, has control and supervision over the transaction? Which law is applicable and which regulatory agency should oversee the auction process? It is therefore not uncommon for online traders to 'jurisdiction shop' and locate a country that has limited consumer protection laws.²⁴ These are complex issues which are not easily resolved, but the TPA provides some extraterritorial protection to online consumers, extending to conduct that occurs overseas. This issue will be discussed later in this paper.

The most important concern with eBay and challenge for regulators is simply that buyers lack the ability to inspect *physically* the merchandise which they aspire to purchase.²⁵ There is no guarantee

<http://casos.isri.cmu.edu/events/conferences/2005/2005_proceedings/Wang.pdf> (accessed 19 November 2008).

- 22 S Ba et al, 'Building Trust in Online Auction Markets through an Economic Incentive Mechanism' (2003) 35 *Decision Support Systems* 273.
- 23 J E J Prins, 'Consumers, Liability, and the Online World' (2003) 12(2) *Information & Communication Technology Law*, <<http://arno.uvt.nl/show.cgi?fid=5221>> (accessed 12 October 2008).
- 24 G Daril, 'Litigation for international online consumer transactions is not cost effective: a case for reform?' (2007) 14(1) *Murdoch University Electronic Journal of Law* 196.
- 25 A Tajirian, 'Auctions, Haggling, and Fixed Prices: A Survey of Recent Literature, DomainMart' (2004), <http://www.domainmart.com/Marketplace/Mechanism_Survey.pdf> (accessed 2 December 2008); see also D Chevlin, 'Schemes and Scams: Auction Fraud and the Culpability of Hot Auction Web Sites' (2005) 18(2) *Loyola Consumer Law Review* 223.

that the goods which they contract to buy actually exist in the first place. Accordingly, complaints levelled against eBay auctions usually take the form of breaches of contract for non-delivery of goods; unreasonable delays in the delivery of goods; the goods not matching the description; and, finally, goods that were indeed faulty or of unsatisfactory quality. The inability to physically inspect the goods prior to purchase and the problems that this has facilitated are best reflected in a recent survey which found that 22 percent of buyers surveyed reported paying for items and not receiving them.²⁶

Although eBay transactions are commonly referred to as auctions, there are several fundamental differences, worthy of restatement, between traditional regulated auctions and the transactions that occur over the eBay platform.²⁷ In fact, eBay has no control over the quality, safety or legality of the items or content posted by users on the site; the truth or accuracy of the listings; the ability of sellers to sell items; or the ability of buyers to buy items. It has somewhat limited legal powers to intervene in disputes between the vendor and purchaser, and is not generally legally responsible for the actions of individual buyers or sellers who trade on the site. Hence, eBay cannot ensure, and does not profess to guarantee, that a buyer or seller will actually complete a transaction or act lawfully in using its site.

In effect, eBay operates only as an online platform service provider or electronic medium through which bids can be made.²⁸ eBay does not, in fact, conduct actual auctions and 'persons or businesses that assist sellers in placing items for sale on eBay are not conducting an auction or acting as auctioneers'.²⁹ In its actual operation,

26 N Moustakas, above n 8.

27 I Steiner, 'eBay Opposes Regulation while Pennsylvania Sellers Face Fines' (2007) *AuctionBytes.com*, <<http://www.auctionbytes.com/cab/abn/y07/m11/i20/s01>> (accessed 2 December 2008).

28 Although eBay is commonly referred to as an 'online auction web site' and claims to function as an auctioneer, it is important to restate that it is, indeed, *not a traditional auctioneer*. See eBay user agreement, <<http://pages.ebay.com/help/policies/user-agreement.html>> It states that 'our sites are venues to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of pricing formats and locations.' It is apparent that eBay facilitates the auction but never takes possession of the goods, and makes no specific warranties about the item's quality, the seller or buyer's honesty, nor does it play any direct role in payments relating to buyer's and seller's.

29 '[E]Bay's User Agreement and the court's summary clearly show that eBay itself is not offering to "sell" anything, the offer for sale is made by the member who places the goods for sale. Because eBay does not "sell or offer for sale real or personal property," the third prong of the test also fails and eBay cannot be considered an "auctioneer" as defined in North Dakota law', see North Dakota Public Service Commission, *Attorney General's Opinion regarding Need for Auctioneer's or Auction*

furthermore, eBay performs functions quite distinct from, and non-equivalent to, those of traditional auctioneers.³⁰ In reality, eBay neither operates in the same way as traditional auctioneers, nor does it have the same responsibilities as a traditional auctioneer. This raises the significant question, then, as to whether consumers participating in what are superficially or ostensibly 'online auctions' are adequately protected when the actual process itself *does not*, in fact, constitute an auction *per se*.

This legal uncertainty pertaining to eBay auction processes in Australia has been resolved by the recent highly-publicised case of *Peter Smythe v Vincent Thomas*,³¹ in which the NSW Supreme Court ruled on the enforceability of eBay contracts involving a minimum bid reserve.³² This case confirmed that the fundamental principles of offer and acceptance in contract law equally apply to contracts formed online. The court held that the listing of the product on eBay was an offer and that the purchaser had accepted this offer by making the highest bid.³³ It clearly demonstrated that the contract formed on eBay was a binding agreement and ordered that the seller complete the transaction. As will be discussed below, this landmark case has changed the future of cyberspace.

3. *Does eBay Auction Protect its Consumers?*

eBay is not legally or contractually liable for the actions of individual buyers or sellers who trade on the site. eBay has established 'Terms of Service' or 'User Agreements' that set the ground rules for the sale of products and materials. In effect, these agreements operate essentially as 'exclusion' or 'exemption' clauses and enable eBay to avoid liability, for example, for the non-delivery of goods. Obviously, the users of the site must agree to the terms of these agreements — or exemption clauses — before undertaking

Clerk's License to Sell Items through an Internet Auction Service, 11/4/05 <<http://www.psc.nd.gov/docs/consinfo/auctions/attorney-general-opinion-11-4-05.pdf>> (accessed 16 October 2008).

30 eBay spokesperson Catherine England argued that, 'there is no evidence that imposing new regulations and licensing requirements upon eBay or eBay sellers would provide any additional consumer protection. However, new regulations would impose unneeded costs and burdens upon both buyers and sellers, many of whom rely on their eBay transactions for their primary source of income.' See, <<http://www.auctionbytes.com/cab/abn/y07/m11/i20/s01>> (accessed 21 October 2008).

31 [2007] NSWSC 844.

32 The judge concluded that an online auction created a contract in the same way as a traditional auction — the auctioneer is the agent of the seller and the agent can accept a bid on behalf of the seller — which is what occurs in an eBay auction.

33 [2007] NSWSC 844.

commercial transactions on the site. According to the eBay User Agreement, eBay and its suppliers provide the site and services 'as is' and without any warranty or condition, express, implied or statutory and specifically disclaim any implied warranties of title, merchantability, fitness for a particular purpose and non-infringement.³⁴

Moreover, consistent with the terms of a standard exemption clause, eBay or its associates and technology partners make no representations or warranties about the accuracy, reliability, completeness, and/or timeliness of any content, information, software, text, graphics, links or communications provided on or through the use of the site or that the operation of the site will be error-free and/or uninterrupted. Consequently, eBay assumes no liability whatsoever for any monetary or other damage suffered by the consumer on account of:

- (a) the delay, failure, interruption, or corruption of any data or other information transmitted in connection with use of the site³⁵
- (b) any interruption or errors in the operation of the site. In this respect, eBay answers no liability for any direct, indirect, incidental, special, consequential or exemplary damages, including, but not limited to, damages for loss of profits, goodwill, use, data or other intangible losses (even if eBay has been advised of the possibility of such damages).

eBay is usually not a party to the contract and therefore not consequently liable for claims made about the goods — such as the non-delivery of the goods or damages resulting from a dispute in relation to the goods. Legally, eBay remains neutral. Clause 3 of eBay's User Agreement indicates that eBay is not an auctioneer.³⁶

In reality, then, eBay will not, indeed, be liable for any economic losses arising out of, or in connection with, the User Agreement, and buyers and sellers use the site at their own risk.³⁷ In other words, the

³⁴ See, eBay User Agreement, <<http://pages.ebay.com/help/policies/user-agreement.html>> (accessed 12 March 2008).

³⁵ Ibid.

³⁶ Ibid. See also, S Ba and P A Pavlou, 'Evidence of the Effect of Trust Building Technology in Electronic Markets: Price, Premiums and Buyer Behavior' (2002) 26(3) *MIS Quarterly* 243, 244.

³⁷ The eBay User Agreement states that, 'Although we are commonly referred to as an online auction web site, it is important to realise that we are not a traditional "auctioneer". Instead, our Site merely acts as an online venue to allow members to communicate and offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of formats, including a fixed price format and an auction-style format

underlying common law principle of *caveat emptor* prevails — users utilise the process at their own peril. This complicates the issue, then, of precisely what are consumers' rights in an eBay auction and what statutory or common law protection is afforded them in the event, for example, of the non-delivery of goods.

In this respect, eBay certainly creates some unique challenges for consumer protection legislation and associated regulatory bodies; it highlights the current mismatch and discrepancy between existing legal regulatory regimes and the actual operation of online 'auction' sites. Clearly, there are significant problems inherent in the eBay or online auction process from the perspective of consumer protection legislation, which warrant close attention and urgent remedy. It is this issue to which attention is now turned.

4. *Are eBay Consumers Protected in Australia?*

As mentioned above, eBay is one of Australia's largest online marketplaces, displaying ever-increasing popularity since it was founded in 1995.³⁸ However, as previously discussed, there are many challenges which regulators and policy-makers confront in affording and incorporating sufficient protection for prospective users of online 'auctions'. For example, it now appears that a significant portion of online auction users in Australia are experiencing problems when shopping at online auction sites.³⁹ In particular, in Australia, 48 per cent of buyers who were surveyed, reported having experienced problems when buying a product through an online auction website.⁴⁰

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 TPA will apply — provided, that is, that the person purchasing the online goods and services fulfils the definition of a 'consumer' stipulated in s 4 and the purpose is a 'consumer purchase'. In summary, the provisions of the TPA prohibit businesses engaging in certain misleading advertising, fraud, and other unfair and dishonest practices. Division 2 of Part V of the Act implies certain warranties and conditions into contracts for the supply of goods and services in

commonly referred to as an "online auction". It further states that 'we are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to pay for items. We cannot ensure that a buyer or seller will actually complete a transaction.'

38 D Chevlin, above n 25, 223.

39 N Moustakas, above n 8.

40 Ibid.

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.⁴¹ Accordingly, the relevant provisions that touch on and implicate online consumer transactions are outlined below.

Section 52 of the Act 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. Section 52 extends to cover all consumer contracts and transactions that are effected in the course of trade or commerce.⁴² *Fair Trading* legislation enacted in all states comprises similar provisions in relation to prohibiting misleading or deceptive conduct by individuals.

In addition, the TPA does have extraterritorial effect: ss 5(1),⁴³ 6(1) and 6(3) of the Act expressly provide that the Act can operate extraterritorially, especially in relation to consumer protection.⁴⁴ Section 5(1) of the TPA clearly states that Parts IV, IVA, V, VB, and VC 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.⁴⁵ Accordingly, if the conduct in question occurred entirely overseas, s 5 provides that the TPA will apply only if the conduct was undertaken by a company registered or carrying on business in Australia.⁴⁶ This clearly demonstrates that the scope of s 52 of the TPA is not limited to domestic commercial activities but also applies to overseas activities.

41 Division 2 of Part V of the TPA.

42 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 s 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 s 80.

43 'Section 5(1) of the TPA is the primary driver to the extraterritorial operation' which includes Pt IV, IVA, V, VB, and VC. See M Davis, 'Extraterritorial Provisions of the Trade Practices Act (1974)' (2006), <<http://governanceondemand.org/Extraterritorial%20Provisions%20of%20the%20Trade%20Practices%20Act.pdf>> (accessed 19 March 2009).

44 Section 5(1) of the TPA does not apply to Pt VI and s 75B which is construed as being only applicable to conduct in Australia.

45 C Lockhart et al, *Misleading or Deceptive Conduct: Issues and Trends* (1996) 343.

46 K Lewins, 'The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 *Trade Practices Act 1974* (Cth)', <<http://www.austlii.edu.au/au/journals/ANZMLJ/2004/4.pdf>> (accessed 20 March 2009).

For example, *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd*⁴⁷ examined the impact of s 52 of the TPA on foreign companies and found that statements made by a person in Denmark via telephone to a person in Perth constituted conduct in Perth for the purposes of s 52. This decision clearly proves that the TPA impacts upon activities that occur overseas but that demonstrate sufficient connection to Australian activities. This decision was followed by *Voth v Manildra Flour Mills Pty Ltd*,⁴⁸ in which the court decided that if a statement is directed from one place to another where it is known or even anticipated that it will be received, the statement can legitimately be deemed to have been made at the place to which it was directed.⁴⁹ Merkel J in *Bray v Hoffman La Roche Ltd*⁵⁰ also confirmed that communications initiated outside Australia but directed to, and expected to be received by, persons in Australia amount to conduct taking place in Australia. These provisions of the TPA extend its power not only to those doing business within Australia (even if they have no corporate presence in Australia) but also to conduct outside Australia in certain circumstances — provisions which could advantage online consumers, who are subject to the ‘borderless’ nature of the online world.

According to s 53 of the TPA, it is also unlawful to make particular types of false or misleading representations, such as falsely representing that goods are of a certain standard, quality and value, or 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) of the TPA prohibits a corporation from making false or misleading misrepresentations 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 particularly 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).

47 (1996) 149 ALR 134.

48 (1990) 171 CLR 538, 568.

49 *Ibid.*

50 (2002) 118 FCR 1, [147], quoted in K Lewins, above n 46.

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. This 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'.⁵¹

When transactions are conducted primarily via the internet, it becomes more difficult to ascertain the place of business of the parties, the place of contracting, and the place of performance of the transactions. In response to this, s 67 of the TPA provides that the proper law of a contract for a corporation to supply goods or services to a consumer would, unless otherwise specified, be the law of any part of Australia. If such a contract contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country, state or territory for all or any of the provisions of this division, s 67 will render the governing law clause, and most likely a governing forum clause, unenforceable.⁵² Part V Division 2 of the TPA implies important warranties and conditions in contracts between corporations (which includes natural persons in some cases: see the discussion of ss 5 and 6 above) and consumers. As discussed above, s 67 of the Act will, in many cases, imply these terms into the contract, overriding any provision which purports to substitute, or has the effect of substituting, the law of some other country for the provisions of Part V Division 2. This provision of the TPA therefore has potentially broad implications for online contracts.⁵³

According to ss 70(1) and 72 of the TPA, where a corporation contracts to supply (otherwise than by sale at *auction*) goods to a consumer based on description, there is an implied condition that the goods will conform to the description. If the agreement to supply is by reference to a sample as well as to a description, the bulk of the goods must conform to the description as well as to the sample.

51 Section 58(b) of the TPA. See A Sorensen, 'Internet auctions, consumer protection and the Trade Practices Act' (2004) 6(8) *Internet Law Bulletin* 3; see also M Webster and A Sorenson, 'Internet Auctions, Consumer Protection and the Trade Practices Act', <<http://www.findlaw.com.au/article/11134.htm>> (accessed 21 October 2008).

52 S Coronas and S Christensen, 'Comparison of Generic Consumer Protection Legislation' (2007), <http://www.pc.gov.au/_data/assets/pdf_file/0008/73691/consumerprotectionlegislation.pdf> (accessed 4 September 2008).

53 M S Jaques, 'Transnational Jurisdiction in Cyberspace – Australia' (1999), <<http://www.kentlaw.edu/cyberlaw/docs/foreign/Australia-Swinson.rtf>> (accessed 21 September 2008).

However, these 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 V 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. Similar terms may be inferred in these transactions by state-based *Sale of Goods Acts*, but such terms can generally be excluded by contract, whereas s 68 ensures that the TPA-implied terms cannot be thus excluded.⁵⁴ These provisions are especially pertinent to online transactions, as the consumer is not able to physically inspect the goods before purchasing them. The regulators should therefore attempt to expand this provision to online auctions.

In addition, it is important to note that the above provisions apply *only* if the relevant conduct is ‘in trade or commerce’:⁵⁵ the consumer protection laws do not apply to purchases where the goods have been bought or auctioned *privately*.⁵⁶ This, then, raises the question as to whether consumers in an online auction are subject to consumer protection under the *Trade Practices Act* if its vendors are mainly private individuals and they are not acting in ‘trade or commerce’.⁵⁷ In effect, if a vendor is conducting a private sale via an auction site, that vendor may not then be subject to the requirements of the above sections.⁵⁸ For this reason, the “in trade” limitation is problematic in the context of an online auction because it is usually impossible for the buyer to distinguish between those vendors acting as individuals⁵⁹ and those vendors who are acting “in trade”.⁶⁰

54 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.

55 M Webster and A Sorenson, above n 51.

56 The terms and conditions of one online auction site state that anything bought in Australia from an online auction isn’t covered by statutory warranties under the *Trade Practices Act*, see ‘Submission to Productivity Commission on behalf of NSW Government’, *Review of Australia’s Consumer Policy Framework*, <http://www.pc.gov.au/_data/assets/pdf_file/0011/63857/sub073.pdf> (accessed 23 November 2008).

57 Most online auctions involve a trade between two individuals. The vendor in such an auction is not acting ‘in trade’.

58 M Webster and A Sorenson, above n 51.

59 However, this rule may not apply to someone who is repeatedly selling items from their homes.

60 K Tokeley, ‘Vendor Bidding on Online Auctions – Protecting Consumers from Vendor Bidding on New Zealand Online Auctions’ (2007) 30 *Journal of Consumer Policy* 137, 142.

An example of this type of issue arose in *O'Brien v Smolonogov*.⁶¹ In *Pilmer v Roberts*,⁶² the Federal Court summarised *O'Brien* as a case where,

a single private sale by an individual of land which was not part of the individual's trading stock, which was not used for any business activity and which was not sold as part of the carrying on of land development was not conduct "in trade or commerce".⁶³

In that case, then, it was demonstrated that the sale of property was essentially a private transaction and, thus, one not undertaken 'in trade or commerce' for the purposes of the Act — thereby enabling the vendor to avoid the obligations and duties owed under the Act. As has been pointed out:

There may be some issues arising as to whether the conduct took place 'in trade or commerce'. It may therefore be preferable, from a consumer protection perspective, for specific prohibitions to be enacted in relation to the conduct of Internet auctions and for those provisions applying to auctions generally to also apply to auctions conducted over the Internet.⁶⁴

It is questionable whether the rights and obligations imposed by current consumer protection legislation in Australia — particularly under the *Trade Practices Act* — can be enforced as effectively in the online environment as in the conventional face-to-face commercial environmental context which is technology-neutral. Accordingly, it is argued that:

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

61 (1983) 53 ALR 107; see also *Bevanere Pty Ltd v Lubidineuse* (1985) ATPR 40–565. See also K Tokeley, *ibid*.

62 *Ian Rutherford Plimer v Allen Roberts & Anor* (1997) 150 ALR 235.

63 *Ibid*, 243.

64 *Review of the Auction Sales Act 1973*, Final Report, Department of Consumer and Employment Protection Government of Western Australia (2007), <http://www.docep.wa.gov.au/ConsumerProtection/PDF/Reports/Auction_Sales.pdf> (accessed 3 September 2008).

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).⁶⁵

On the other hand, states' *Sale of Goods Acts*⁶⁶ also impose implied conditions on the auction process, such as conditions relating to the quality of goods and their fitness for their claimed purpose.⁶⁷ Regarding the supply of goods, the goods must be of merchantable quality. For goods to be of merchantable quality, they must meet the reasonable expectations of the purchaser in regard to the nature and the use of the goods; the price and the conditions under which they were sold (for example, whether they were brand new or second-hand); and whether the goods are reasonably fit for the buyer's intended purpose. If a seller breaches these conditions, then a buyer may be entitled to compensation for any associated loss in value of the goods. In addition, the Acts extend the operation of common law by restricting purchaser bids to the seller or to only one person or agent bidding on the purchaser's behalf.⁶⁸ States' *Sale of Goods Acts* do apply to all new goods bought at auction and also to second-hand goods bought at auction where one does not have the opportunity to attend in person — for example, an internet auction. However, the Acts do not contain any official reference to online auctions, again indicating that online 'auctions', such as those facilitated by eBay, are not really 'auctions' at all for the purposes of commercial law.

In addition, according to state and territory-based *Fair Trading Acts*, traders who operate on internet auction sites must comply with the applicable state legislation. The Acts prohibit unfair practices, such as offering prizes or gifts without intending to supply them, or not supplying them as offered; bait advertising; demanding or accepting payment without intending to supply the goods or services, or without believing they will be ready at a specified time; or intending to supply different goods or services, and the like. The Acts further

65 R G Smith, 'Deceptive and Misleading Online Advertising and Business Practices' (2000), <http://www.aic.gov.au/conferences/other/smith_russell/2000-10-crf.pdf> (accessed 21 July 2008).

66 The *Sale of Goods Act 1896* (Qld) establishes standards for the sale of goods. Similar uniform sale of goods legislation exists in other Australian jurisdictions comprising virtually identical provisions. This is equivalent to s 60 of the *Sale of Goods Act 1923* (NSW), s 57 of the *Sale of Goods Act 1895* (SA), s 60 of the *Sale of Goods Act 1954* (ACT), s 64 of the *Sale of Goods Act 1958* (Vic), s 57 of the *Sale of Goods Act 1895* (WA), s 62 of the *Sale of Goods Act 1896* (Tas), s 60 of the *Sale of Goods Act 1972* (NT).

67 For example, ss 18, 19(1), 19(2) and 20 of the *Sale of Goods Act 1923* (NSW) are relevant to the correspondence with description, fitness for purpose, merchantable quality and sale by sample respectively.

68 *Sale of Goods Act 1896* (Qld) s 57.

prohibit people 'in trade' from making misleading claims or false representations in regard to goods or services for sale, irrespective of the contractual arrangements or agreements between the respective parties. The Acts each contain provisions prohibiting misleading and deceptive conduct and unconscionable conduct, and prohibiting specific false representation and other unfair practices. The provisions essentially mirror those in the TPA.⁶⁹ However, the problem is that this Act defines 'trade or commerce' as including 'any business or professional activity'. Significantly, this means that the Act applies to online auctions where you buy from a professional trader — but does not apply when you buy from a private, 'one-off' seller.

Moreover, in 2006, the Australian Government replaced the *Model Code* with the introduction of the *Australian Guidelines for Electronic Commerce*, which seek to increase consumer confidence in electronic commerce by providing guidance to businesses about how to deal with consumers when engaged in business-to-consumer electronic commerce. The objectives of the Guidelines include fair business practices; advertising and marketing; information (both pre-contractual and contractual); payment systems; privacy; internal complaint handling; and external dispute resolution.⁷⁰ In accordance with the Guidelines, internet advertising and marketing should be clearly identifiable and distinguishable from other content on a company's web-site.⁷¹ Also, the online service provider itself must be identifiable so the consumer knows the identity and the location of the provider that is offering goods and services.⁷² It also states that businesses engaged in electronic commerce should provide enough information about the terms, conditions and costs of a transaction to enable consumers to make informed decisions.⁷³ However, these guidelines were developed as a specifically voluntary code of conduct to provide *voluntary* guidance to industry and consumers concerning the elements of an effective self-regulatory framework in electronic commerce.

It is reasonably clear that the existing legislative frameworks in Australia do not provide the same level of protection for online

69 The fundamental difference with the *Fair Trading Acts* is that they regulate 'persons' and thus are not restricted to corporations.

70 M E Plotkin et al, *E-commerce Law & Business* (2003).

71 Article 18 of the Model.

72 See Articles 23 and 24 of the Model.

73 Article 25 of the Model. Accordingly, this information should be clear, accurate and easily accessible. It should be provided in a way that gives consumers an adequate opportunity for review before entering into the transaction and that allows consumers to retain a copy of the information.

consumers as they do for off-line consumers.⁷⁴ It is still not clear which laws apply and which laws do not apply to online auction processes. This can be traced to the fundamental and overriding difficulty as to whether, indeed, an online auction constitutes an auction *per se* in the first place. Accordingly, very little attention has been paid to the legal issues relating to protection of consumers using online auction sites, an issue of very real concern to policy-makers and consumer protection agencies. To be fair, one of the reasons for this neglect might be that the concept of an internet auction was clearly not contemplated at the time the relevant legislation was introduced. In particular, most consumer protection legislation, such as the *Trade Practices Act* and states' *Sale of Goods Acts* were introduced many years ago; much has changed since then, and issues have emerged — such as on-line fraud — that did not even exist when the laws were originally drafted.⁷⁵

There is thus a necessity to refine existing consumer protection laws to accommodate the unique characteristics of the online environment. A special regulatory framework is required to supervise internet-based transactions, as off-line rules do not adequately cover new technologies on the internet. It can be argued that amendments *should* have been introduced to the relevant legislation in response to the advent of internet auctions. The sheer prevalence and high usage of this electronic medium must demonstrate to policy — makers that urgent legislative reform is needed so as to keep pace with technological changes and to incorporate protections to consumers who may be spending significant amounts of money on this platform. While the concept of caveat emptor may be appropriate to nineteenth century laissez-faire English society, where an unregulated market capitalism prevailed, it is clearly no longer appropriate in an age where consumers have little knowledge of the legal complexities of the transactions into which they are entering, and where there is clear inequality of bargaining power between vendors and purchasers.

74 One further failing in the existing legislative framework is that there is currently no policy or laws in place to protect online shoppers' privacy. These deficiencies clearly draw attention to the uncertainties and ill-defined nature of the law pertaining to online 'auction' processes.

75 One commentator has argued that '...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.' See G Samuel, 'The Foundations of Good Consumer Protection Policy: Strong Law, Vigorous Enforcement and the Educated Consumer' (2007), <<http://www.accc.gov.au/content/item.phtml?itemId=782730&nodeId=e3589c06277ff3900170bb4c35a4f785&fn=The%20foundations%20of%20good%20consumer%20protection%20policy.pdf>> (accessed 11 August 2008).

In consequence, we would commend to policy-makers the urgent need to introduce new legislation or amend existing legislation, such as the *Trade Practices Act*, to clarify the concept of 'auction' and, perhaps, to extend this concept to processes where the system is conducted on-line. This would enable the incorporation of the protection contained in much of the existing Australian legislation into online 'auction' processes. Guidelines are required to cover private sale and auctions under the Act, to develop consumer confidence in auction sites, and to protect buyers and sellers against unfair and anti-competitive conduct within online auctions. It is also important to note that all possible categories of e-commerce activities and protection of online consumers should be identified within national legislation irrespective of whether the purchaser is a person or company.

We would also commend to policy-makers the incorporation of provisions into the existing legislative framework whereby 'User Agreements' and similar exemptions or exclusion clauses be construed strictly against the online provider or *contra proferentum* to ensure that providers do not unfairly avoid their liability. We would also recommend that the online provider be deemed — through a 'deeming' provision — in an amended state or federal legislative framework to be acting as agent for the vendor so that the provider becomes a *party to the contract* and can therefore not avoid their contractual liabilities and responsibilities. Such recommendations would only begin to resolve the quite complex problems implicated in the online auction process, but we suggest that they would go a long way towards building public trust in an electronic medium which is only going to further expand in its operation and popularity.

5. *How Courts are Responding in Australia and Overseas*

Only a few cases have addressed these questions in Australia. However, several international cases have sought to address the precise legal construction of eBay and its attendant responsibility to online consumers.

Recent activity in the United States in the case of *Tiffany (NJ) Inc. v eBay Inc*⁷⁶ seems to call for a review of the liability of online auction sites. In this case, the famous jewellers, Tiffany & Co., accused eBay Inc. of turning a 'blind eye' by promoting and facilitating the sale of

⁷⁶ Unreported, case No. 04 Civ.4607 (KMK), <<http://www1.nysd.uscourts.gov/cases/show.php?db=special&id=84>> (accessed 22 December 2008).

counterfeit Tiffany products on its online site.⁷⁷ eBay defended the action by arguing that they simply could not police and superintend their site to ensure that the sale of counterfeit items would not occur. Their argument was that the practicalities and logistics of monitoring all transactions were simply impossible and that buyers and sellers should have been aware of this fact. This raises the obvious question as to whether eBay has an affirmative obligation to ensure and investigate that all transactions conform to the common law and statute. In response to this, eBay argued that it simply provides a venue for commercial transactions to be undertaken but does not guarantee the legalities of the transactions. In other words, it is simply providing a marketplace or 'electronic platform' upon which buyers and sellers can negotiate and transact business. However, their contention was repudiated by the court, who found in favour of Tiffany. eBay was forced to shut down all auctions of any Tiffany items.

The German Supreme Court in the case of *Rolex SA v eBay GmbH*⁷⁸ decided that once eBay is informed of a clearly identified infringement, it must take reasonable measures to prevent recurrence and may, in certain circumstances, be liable upon first notice of infringement.⁷⁹ This case is subject to a six-year-old dispute over the sale of counterfeit Rolex watches on eBay's German site. The Swiss luxury brand took eBay to court after a number of fake Rolex watches were offered for sale on the website between June 2000 and January 2001. The court ruled that the internet auctioneer eBay must try to prevent attempts to sell fake Rolex watches on its website. In July 2007, the German Federal Supreme Court extended the reach of the Rolex decision in *IVD v eBay*.⁸⁰ In this case, the court held that, in certain circumstances, a duty of care could be found to exist to competitors, and required eBay to take reasonable measures to prevent illegal items from being listed even where the competitors were not directly harmed.⁸¹ Such duty of care would also extend to other listings by the same seller in the same category, not just to identical listings.⁸²

77 The jeweller argued that eBay is both directly and indirectly assisting fraudsters, especially because some sales of fake items have been publicised on the front page of the site. See, C Riefa, above n 10, 168.

78 Bundesgerichtshof (*Rolex SA v eBay GmbH*) (I ZR 304/01) Unreported, March 11, 2004.

79 Ibid.

80 Unreported case, Case No. 4 a O 464/01 (Oct. 29, 2002).

81 Ibid.

82 Ibid.

In June 2008, in the court decision of *eBay v Dior, LV*,⁸³ the Paris Court of Commerce ruled that eBay and eBay International AG were liable for failing to prevent the sale of counterfeit items on its websites.⁸⁴ They were found to have traded on the plaintiffs' brand names and to have interfered with the plaintiffs' selective distribution network. Louis Vuitton Malletier, the handbag and luggage section of the LVMH group, and Christian Dior Couture accused eBay of allowing people to use its site to sell fake bags, lipstick, perfumes and clothes from the famous brand names, even when authentic goods were on sale.⁸⁵ The court awarded the plaintiffs approximately EUR 38.6 million in damages and issued an injunction prohibiting sales over all worldwide eBay sites of perfumes and cosmetics bearing the Dior, Guerlain, Givenchy and Kenzo brands.⁸⁶

The above decisions confirm that it is eBay's responsibility to monitor its website for counterfeits and to bring counterfeits to the attention of its users. On the one hand, it can be argued that eBay, as the service provider, must be responsible to its buyers, as it profits from each item sold on its website, whether the goods are counterfeit or not. It can also be argued that eBay may need to monitor sale items to ensure that the items do not infringe on any trademarks. On the other hand, it can be asserted that eBay may lack the expertise to decide when an item is infringing, as only the rights owner has the necessary expertise to make that determination.⁸⁷ This raises the question of whether the service provider must be held accountable for infringing activity if it does not have 'actual knowledge' of that activity. The aforementioned decisions confirm that eBay should be held liable if they have a certain degree of knowledge of the third party's infringing and fail to take 'reasonable steps' to prevent the infringement. However, what constitutes a 'reasonable step' is undefined and open to judicial interpretation. The outcome of these cases will have major implications, both for eBay and for trademark owners whose goods are sold via eBay.⁸⁸ In effect, the principle of

78 The Epoch Times, (online) <http://beforeitsnews.com/story/17647/Ebay_Ordered_to_Pay_Damages_to_Louis_Vuitton.html> (accessed 21 March 2010).

84 EBay Inc, 'Legal Proceedings', <http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=7062869-229159-241492&SessionID=8EsGHFiwbTrC4J7> (accessed 2 April 2010).

85 Ibid.

86 Ibid.

87 K Kupferschmid, 'No Silver Lining in Tiffany's Infringement Case', <<http://www.allbusiness.com/legal/legal-services-litigation/11585583-1.html>> (accessed 1 September 2008).

88 Jeff Pietsch, 'Tiffany v. Ebay: Is Ebay Responsible for Trademark Infringement?', <<http://www.theiplawblog.com/archives/>>

caveat emptor does apply to eBay transactions, and buyers and sellers utilise the technology at their own risk.

However, in contrast, *Lars Gentry v eBay Inc.*⁸⁹ is another famous American case in which the plaintiffs were defrauded by purchasing fake sports memorabilia, including baseballs and bats, that purported to have been signed by sports icons such as Mickey Mantle and Joe DiMaggio.⁹⁰ The defendants had been peddling these fake items on eBay for nearly four years. Even though the plaintiffs argued that eBay should be considered an auctioneer or dealer, the California court held that eBay had no responsibility to authenticate the items in question, since eBay was not the party physically selling the items.⁹¹ The court therefore found against the consumers who had been defrauded on eBay, believing that what they were buying were genuine autographed sports cards.⁹²

The decision in *Gentry* runs somewhat counter to the above decisions in that it is suggestive of the fact that eBay is simply an electronic medium which purely provides a 'neutral' marketplace for the buying and selling of items. This case claims that eBay auctions cannot always be considered as traditional auctions. With respect, we believe that this decision was fundamentally flawed. eBay should have been considered as agent for the vendor and should, therefore, have been held responsible for the fraudulent misrepresentations that were made. One commentator stated that 'the site will receive commission even on the sale of counterfeit goods, thus benefiting from illegal activities taking place via its intervention. It should be a factor taken into account when considering the liability or absence of liability of online auction sites'.⁹³

*Evagora v eBay Australia & New Zealand Pty Ltd*⁹⁴ was the first judicial decision in Australia in relation to an internet auction dispute. Mr Evagora was the eBay buyer to whom eBay was held liable to pay damages for a computer that failed to arrive, which he purchased in an on-line auction. eBay sought to limit its liability by disclaimers or exclusion provisions in its User Agreement. However, it was pointed out in the case that Mr Evagora did not read the (quite lengthy) User Agreement before clicking the 'I accept' button. The tribunal found that eBay's disclaimers in their User Agreement did not override

trademark-law-tiffany-v-ebay-is-ebay-responsible-for-trademark-infringement.html> (accessed 23 March 2010).

89 *Gentry v eBay*, 121 Cal.Rptr.2d 703 (2002).

90 D Chevlin, above n 25, 223.

91 *Ibid.*

92 C Riefa, above n 10, 187.

93 *Ibid.*

94 [2001] VCAT 49 (20 July 2001).

their prominently placed representations concerning the safety of dealing on eBay and the statement that goods purchased on eBay were insured. The court held against eBay.⁹⁵ This case clearly shows that eBay's User Agreements must be brought into line with Australian consumer protection laws, and that eBay must carefully review the manner in which it interacts with and protects its users.

The above decisions produced a variety of results for consumers. However, the legal uncertainty pertaining to eBay auction processes in Australia has been resolved by the recent well known case of *Peter Smythe v Thomas*,⁹⁶ the '1946 World War II Wirraway Plane' decision in which the plaintiff, Peter Smythe, sued the defendant, Vin Thomas, for failing to deliver the item for which the buyer had bid. The buyer, Adelaide 'warbird' enthusiast Peter Smythe, sued the seller, Albany radiographer Vin Thomas, for allegedly breaking the rules of eBay by refusing to hand over the plane, a 1946 Wirraway.⁹⁷ The plane — one of only five in the world still flying — was put up for sale on eBay by Dr Thomas in August. Dr Thomas listed the aircraft on eBay with an auction period of ten days and a reserve of \$150 000. At the end of the auction period, eBay informed both Smythe and Thomas that Mr Smythe had 'won' the aircraft. There were no other bidders. But unknown to Mr Smythe, Dr Thomas had already agreed to sell the plane to a Queensland buyer for almost \$250 000.⁹⁸ Mr Smythe was the only person to bid, matching the reserve price with just 20 seconds to go before the auction closed on 25 August 2007.

The court ordered Thomas to complete the sale even though he had changed his mind about selling the 1946 World War II Wirraway plane under the terms on which he had placed it on the internet auction site. This time, the seller had apparently worked out a separate deal to sell the plane outside of eBay for a more profitable price. The plaintiff purchaser, who eventually succeeded in the action, demanded specific performance of the contract and that the court order the vendor to transfer the plane to him, as he had offered the highest bid and was therefore entitled to the plane.⁹⁹ Crucially, the court examined the eBay Rules, especially Clause 5.2, which stated that 'if you receive at least one bid at or above your stated minimum price (or in the case of reserve auctions, at or above the reserve price), you are obligated to complete the transaction to the

95 K L Harris and M S Jaques 'The Globalisation of the Consumer – How the Law is Responding', <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~BBKathleen+Harris+3_3.doc/\\$file/BBKathleen+Harris+3_3.doc](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~BBKathleen+Harris+3_3.doc/$file/BBKathleen+Harris+3_3.doc)> (accessed 23 August 2008).

96 [2007] NSWSC 844.

97 *Ibid.*

98 *Peter Smythe v Vincent Thomas* [2007] NSWSC 844.

99 [2007] NSWSC 844.

highest bidder upon the item's completion'.¹⁰⁰ This case clearly demonstrates that an online auction is completed when a nominated deadline has passed. If the reserve price has been reached at this deadline, the highest bidder 'wins' the item and is deemed to be the buyer. Even though the court ruled that the offer was accepted by Dr Thomas when Mr Smythe made the highest bid, certain important elements of the conventional agreement, regarding payment terms, had not yet been concluded. However, the court concluded that the parties had, in fact, entered into a binding contract for sale according to the eBay rules.¹⁰¹

This case removed some of the uncertainty relating to applicable law in Australia and ruled that an eBay sale essentially constitutes an auction and, therefore, a sale of goods. Specifically, the *Wirraway Plane* case has clarified the law relating to online auctions — via the process of eBay — in Australia and confirms that transactions thus made via eBay constitute legally binding and enforceable contracts. Hence, the decision in this case reinforces the point that the ordinary laws of contract and, more specifically, those relating to auctions, do govern transactions for the sale of goods on eBay. The case is undoubtedly a welcome one since it will enhance consumer confidence in the sales processes underpinning eBay and ensure henceforth that vendors and purchasers will be legally bound by their respective offers and acceptances. The court upheld this reasoning. It noted that the eBay sale is a sale and a bid on eBay is binding and legally enforceable: 'It follows that, in my view, a binding contract was formed between the plaintiff and the defendant and that it should be specifically enforced.'¹⁰² The judge concluded that 'an online auction created a contract in the same way as a traditional auction — the auctioneer is the agent of the seller and the agent can accept a bid on behalf of the seller — which is what occurs in an eBay auction'.¹⁰³

This decision may, indeed, have international ramifications for consumers on the eBay online auction site. Bidders repudiating their bids or simply presenting bids which are purely vexatious or spurious, have long been a problem for eBay. The court in this decision clearly held such bids to be offers, which created in the vendor the power of acceptance to legally bind the bidder to his or her offer. The consequence of this is that, in future, people might have to think twice before buying or selling items on eBay or any online auction site, especially in Australia, because it constitutes a

100 Clause 5.2 of the eBay Rules.

101 Legal quotes (2008), <http://www.rankinnathan.com.au/newsletters/Legalquotes_Autumn_2008_Newsletter.pdf> (accessed 18 March 2009).

102 *Peter Smythe v Vincent Thomas* [2007] NSWSC 844, [77] (Rein J).

103 *Ibid.*

legally binding contract and the rules of 'traditional' auctions apply to these 'online auction' processes. Such a position is, of course, highly desirable, since it enhances consumer confidence in the process and enables buyers and sellers to act in reliance on the conduct of others.

The court also intimated that eBay was, in effect, an agent for the vendor and therefore had to monitor and superintend the conduct of vendors; they were, in effect, responsible for the activities of vendors. This is again, we believe, a highly desirable finding since it incorporates protection for consumers using the online process. Nevertheless, it still sidesteps the issue as to whether eBay or other online auction processes are auctions *per se*.

However, this case sets an important precedent for buyers and sellers engaging in the formation of online contracts.¹⁰⁴ The authors are in favour of this decision, as it clearly states that online contracts are likely to bind the parties in the same way that paper contracts are binding. It is argued that online consumers must be provided an effective level of consumer protection, which will, in turn, be a significant driver in the growth and facilitation of online shopping. Such initiatives need to be developed by the government to foster online consumers' trust in eBay. Traditional contract laws were created before internet shopping and online commerce were contemplated. They have had to be significantly modified to ensure that an online transaction is considered a binding contract between both buyer and seller.¹⁰⁵ More extensive 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. It may be the best that policy makers can do, for the time being, in order to protect users of the system.

6. The Way Forward

A lack of consumer protection for online consumers has become an increasingly pervasive problem in Australia and one of the most important factors hindering the development of eBay transactions. The biggest problem with online contracts now is enforcement.

On one hand, much has changed since both the *Trade Practices Act* and state *Sale of Goods Acts* were introduced, with issues such as on-line fraud having emerged which did not exist when such legislation

¹⁰⁴ Warren McKeon Dickson Newsletter (January 2009), <<http://www.wmdlw.com.au/publications/NL59-January2009.htm>> (accessed 15 November 2008).

¹⁰⁵ Saul Squires, 'Some contract issues arising from online business-consumer agreements' (2000) 5(1) *Deakin Law Review* 95.

was drafted.¹⁰⁶ On the other hand, the rights afforded by the TPA may therefore be of little or no practical benefit to the e-commerce online consumer. The consumer may have no way of enforcing them, due to the anonymity of parties in transactions and the significant geographical distances between parties.¹⁰⁷ Briefly, the Act is not intended to be an exhaustive guide to all the issues that may arise in e-commerce. A new law must be introduced or the current law and regulations must be amended to protect online consumers and to increase consumer trust in e-commerce. Possible approaches and resolutions to this problem include consumers being supported by, and having recourse to, a code of conduct or national e-commerce consumer protection legislation, or indeed to entirely new legislation dealing specifically with the concept of 'online auctions'.

The responsibility of online auction-house providers requires clarification. We would suggest that this could be best effected by treating them as agents of vendors and therefore as parties to the contract. This would eliminate any purported stance of 'neutrality' which they might seek to adopt in order to avoid liability under contracts formed online. We would also suggest that a strict approach be adopted by legislators to 'User Agreements' in which online providers purport to avoid any liability whatsoever for breaches of agreement formed in online environments. As one commentator has argued, 'given the important amounts of money earned by the online auction industry, and in particular eBay (\$1.44 billion profit in 2006 worldwide), it would seem appropriate to rethink the liability of intermediaries and reflect on the possible liability of online auction sites at least with regard to recurring fraud'.¹⁰⁸ This rule of construction could be codified in legislation or, alternatively, could be undertaken through common law, whereby courts simply extend the *contra proferentum* rule to include the online exemption clauses relied upon by such providers as eBay.¹⁰⁹

Punitive sanctions are also required against online auction houses that do not obey these legislative and common law rules. In this

¹⁰⁶ G Samuel, 'The foundations of good consumer protection policy: strong law, vigorous enforcement and the educated consumer' (2007), <<http://www.accc.gov.au/content/item.phtml?itemId=782730&nodeId=e3589c06277ff3900170bb4c35a4f785&fn=The+foundations+of+good+consumer+protection+policy.pdf>> (accessed 15 November 2008).

¹⁰⁷ H Corner, 'New Zealand Consumers and Internet Purchases' (2001) 22 *Victoria University of Wellington Law Review* 573.

¹⁰⁸ C Riefa, above n 10, 191.

¹⁰⁹ OZtion, Trading Post and BidMadness are other Australian auction sites. OZtion has become the second largest auction site in Australia. Trading Post has been one of Australia's favourite places to buy and sell for over 40 years. BidMadness is Australia's most exciting online auction site. They auction brand new, brand name products discounted up to 99% off the retail price.

regard, the auction site must assume a certain degree of responsibility for its own customers. Every second, more than 60 listings are being made on eBay's website globally.¹¹⁰ Each listing could directly or indirectly lead to a profit of \$2.40 for eBay.¹¹¹ However, the current consumer protection regime provided by eBay does not fully address the needs of online consumers.¹¹² As Susan Grant stated, the auction hosts 'have a moral responsibility to keep their sites from being used for fraud'.¹¹³ Expressly, it is argued that:

eBay and other e-commerce businesses can meet that challenge by developing creative programs to provide consumers with: (1) online information to evaluate the safety and reliability of a transaction, (2) targeted safeguards to protect against unscrupulous users, and (3) easily comprehensible online programs and policies designed specifically to combat fraud, deception and misuse.¹¹⁴

It is apparent that eBay has provided certain types of protection mechanisms for the consumer, such as means to provide feed back; however, there are still some deficiencies and shortcomings in the system that can be improved.¹¹⁵ eBay always argues that it just provides a venue to the buyers and sellers and is not responsible for any economic losses. However, if the host auction can make money at the close of every auction held on their web site, despite the transaction being fraudulent, the question is whether it is fair for eBay to only provide a marketplace for its users and turn a blind eye to the seller's deception.¹¹⁶ This is the question that needs to be addressed in the future.¹¹⁷ If 'online auction houses claim a fee as a

110 An estimated figure according to the Fourth Quarter and Full Years Financial Results of eBay for 2005, available at <<http://investor.ebay.com/news/Q405/EBAY0118-123321.pdf>> (accessed 15 March 2008), Quoted in J Gu, 'An Overview of eBay's Consumer Protection Regime: Towards a Sound Protection of eBay's' (21st BILETA Conference: Globalization and Harmonization in Technology Law, Malta, April 2006).

111 Ibid.

112 Ibid.

113 Marilyn Geewax, 'Swindlers Cash in with Net Auctions' *The Atlanta Journal-Constitution* (Atlanta) 24 October 1999, A9; see also J M Snyder, 'Online Auction Fraud: Are the Auction Houses Doing All They Should or Could to Stop Online Fraud?' (2000) 52 *Federal Communications Law Journal* 453.

114 J M Snyder, above n 113.

115 J Gu, above n 110.

116 D Chevlin, 'Schemes and Scams: Auction Fraud and the Culpability of Host Auction Web Sites' (2005) 18 *Loyola Consumer Law Review* 223.

117 It is mentioned that over half of those who responded (53.4%) agreed that eBay should be legally required to compensate a purchaser or seller in such circumstances. Twenty nine percent said they should not

percentage of the value of the transaction, it is only fair that they bear some responsibility for controlling the fraud that is occurring on their site'.¹¹⁸

The following are some suggestions for consideration by online auction house providers to reduce consumers' vulnerability in online auctions:

- (a) That eBay online auction house establish an effective self-regulatory system to provide more protection for its consumers; that eBay recognise that online commerce will not continue to flourish if consumers lose confidence.¹¹⁹
- (b) That the auction house establish a better mechanism to let bidders establish the identity of other bidders.¹²⁰ While members are required to enter their personal information such as name, address and telephone number in order to register for eBay, eBay cannot and does not confirm each user's purported identity.¹²¹ That the online auction house set down higher standards for verifying users' identities in which it must verify the sellers' and bidders' identity before registration and be obliged to give users the vendor's details, so tracing the vendor will not be difficult. This will also provide an increased level of security and trust between buyers and sellers.
- (c) That eBay auctions also facilitate an online alternative dispute resolution scheme, which can be facilitated by a virtual courtroom with mediators. The rationale behind this argument is that the auction house must take some responsibility in resolving disputes between users which may prevent them seeking independent legal advice. This should be provided free for affected customers and be able to make binding decisions. This may decrease consumers' vulnerability in online auctions and give consumers more confidence, by knowing that the host protects them.

be held liable and 17.5% did not know. See L Edwards and A Theunissen, 'Creating Trust and Satisfaction Online: How Important Is ADR: The eBay Experience' [2007] 5 *Web Journal of Current Legal Issues*, <<http://webjcli.ncl.ac.uk/2007/issue5/edwards5.html>> (accessed 2 August 2008).

¹¹⁸ K Tokeley, above n 60.

¹¹⁹ P P Swire, 'Trustwrap: The Importance of Legal Rules to Electronic Commerce and Internet Privacy' (2003) 54 *Hastings Law Journal*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=424167> (accessed 22 March 2009).

¹²⁰ C Passch et al, 'Online Auction Protocols: A Comparative Study' (2001), <<http://www.springerlink.com/content/01xdf12n86rde7ht/>> (accessed 2 September 2008).

- (d) That existing law and policy related to delivery conditions, including timing, payment conditions and a refund scheme be reassessed.
- (e) Regulations be introduced to facilitate the superintending of cross-border transactions.
- (f) That escrow services be introduced to eBay, which allow buyers to wait until goods are received before authorising payment.¹²²
- (g) That a new, more effective penalty system be enforced in case of non-compliance in order to prevent fraud.
- (h) That effective educational programs be established to raise public awareness about internet fraud.

Briefly, auction sites such as eBay must reassess their own set of regulations governing auctions and design them so as to afford protections to both the vendors and purchasers.

7. Conclusion

The rise in the use of online auctions has presented the law with a number of interesting challenges regarding consumer protection. Contract law requires adjustment to accommodate electronic media, including online auctions and forums. Clearly, there is a mismatch and fundamental discrepancy between the operation of online 'auction' sites, such as eBay, and conventional law as articulated in common law contract casebooks. The law will require updating either through amending the existing legislation or introducing a new self-contained statutory framework dealing exclusively with online auction houses. This problem will only be solved by means of a cooperative approach where laws align with community norms and where there is a concerted approach on the part of regulators to enforce these laws.

At the same time, clearly, it is not satisfactory for online auction houses such as eBay to argue that they are simply providing a marketplace or 'neutral' forum in which vendors and purchasers undertake transactions at their own risk. This essential advocacy of '*caveat emptor*' may have been appropriate in the nineteenth century but it is not good enough in a contemporary context where a multitude of consumer protection legislation exists and where there is a recognition that consumers are at a significant disadvantage to retailers and service providers.

122 C Boyd and W Mao, 'Security Issues for Electronic Auctions' (2000), <<http://www.hpl.hp.com/techreports/2000/HPL-2000-90.pdf>> (accessed 9 December 2008).

One way out of this impasse, as we have shown, is to treat online 'auction' processes as, indeed, auctions *per se* for the purposes of the law. This would enable the courts to regard the online auction house as an agent of the vendor and therefore a party to the contract. The online auction provider would therefore be made responsible and liable for its actions. Clearly, more academic research is required in this area. It is hoped that we have raised several pertinent issues pertaining to this system of e-commerce which will now be subjected to further academic study. Accordingly, it is hoped that this article will go some way to confirming the law governing, and precise legal status of, eBay. It may thereby enhance public confidence in the eBay processes and facilitate further trade and commerce using this highly useful e-commerce tool.