

# The Exclusion of Consumer Rights in e-Auctions – Is an e-Auction Really an Auction at all?

Trish O'Sullivan<sup>1</sup>

**Abstract**—This paper considers the exclusion of consumer rights by the New Zealand Consumer Guarantees Act 1993 in e-auctions. The paper asserts that the absence of an individual auctioneer conducting each e-auction means that e-auctions may not be auctions at all. The paper also questions the justification for excluding consumer rights in e-auctions because the rationale for excluding consumer rights in traditional auctions does not fit with e-auctions due to the significant differences in the sale processes. The paper recommends reform by way of statutory amendment.

**Keywords**—auction, auctioneer, consumer rights, e-auction.

## I. INTRODUCTION

THE consumer rights established by the New Zealand Consumer Guarantees Act 1993 (“CGA”) do not apply to supplies of goods “by auction”.<sup>2</sup> The word “auction” is not defined in the Act but it appears to be widely accepted that the Act does not apply when goods are sold by traders,<sup>3</sup> to consumers using e-auction sites such as “Trade Me” and “eBay”.<sup>4</sup> This issue has not been specifically addressed judicially and there is certainly room for arguing that a purchase of goods using an e-auction site is not an auction at all. If such a purchase is not an auction then consumers would have rights under the CGA. At best the current position is unclear.<sup>5</sup> In New Zealand, if the CGA does not apply to a consumer purchase of goods (for example if the supply is by auction) then the conditions implied by the Sale of Goods Act 1908 apply. These conditions provide some consumer protection but the seller may contract out of these conditions.<sup>6</sup> Under the CGA the seller may contract out of the protections in the CGA only if the “consumer” buying the goods is a business.<sup>7</sup>

This paper considers whether the reference to auction in the exclusions set out in the CGA covers “e-auctions”. This will involve an explanation of the e-auction process, a consideration of whether e-auction sites operate as auctioneers and whether e-auctions are auctions at all. Various definitions of “auction” and the consequences that flow from selling by auction will be outlined. The rationale behind the traditional exclusion of consumer rights in auction sales will be discussed in order to determine whether this rationale is in fact relevant to e-auctions. If there is no real justification for excluding consumer rights in e-auction sales of goods then the law in this area needs to be reformed. In conclusion, possible reforms are discussed.

## II. THE E-AUCTION PROCESS

An e-auction of goods on sites such as “Trade Me” and “eBay” involves the display of goods for sale on a website where the goods are generally sold to the highest bidder at certain point in time. There may be a reserve price set for the goods, in which case they will not be sold unless the reserve is met. A flag generally pops up on the display to indicate when the reserve is met. Some e-auctions make use of a “buy now” option which allows a buyer to purchase goods at a specified price immediately. Such a purchase is not “by auction” and there is no question that the CGA applies to these sales. The websites enable bids to be placed and displayed so that others can view the process. The sites facilitate communication between buyers and sellers and publish feedback on users. The auctions are conducted by the buyers and sellers themselves and there is no independent third party controlling the auction process. The websites provide a venue for the auction to take place. The websites do notify successful bidders by email that they have “won” the goods and disclose contact information for the seller. The sites are able to control who may use the sites and can ban parties for breach of the rules relating to use. However a party who is banned can easily reinvent themselves under a new name and new email address.

## III. DO E-AUCTION WEBSITES ACT AS AUCTIONEERS?

The “User Agreement” for “eBay” which sets out the terms on which eBay offers its services states that “eBay is not an auctioneer”.<sup>8</sup> The terms also state that “eBay is not involved in the actual transaction between buyers and sellers”.<sup>9</sup> The

<sup>1</sup> LLB(hons), MComLaw(hons), Lecturer in Business Law, Massey University, Auckland, New Zealand.

<sup>2</sup> s.41(3)(a) CGA

<sup>3</sup> i.e. suppliers acting “in trade” as defined in s.2 CGA

<sup>4</sup> Consumer Magazine contribution to Sunday Star Times article, “How to Avoid Bidding Goodbye to Your Rights”, 8 November 2009, page A8; Motor Vehicle Disputes Tribunal decisions MVD 019/07 (AK) [2007] NZMVD 44 (23 March 2007) at p.5 and MVD 93/2008 (AK) [2008] NZMVD 92 (30 May 2008) at p.4

<sup>5</sup> See: Dr Kanchana Kariyawasam, “Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand”, (2009) 15 NZBLQ 178 at page 191 and Simpson Grierson’s x-tech group, “A Guide to E-Commerce Law in New Zealand” Brookers Ltd 2002, p 316.

<sup>6</sup> s.56 Sale of Goods Act 1908

<sup>7</sup> s.43 CGA

<sup>8</sup> Available at: [www.ebay.com.au](http://www.ebay.com.au). See: clause 3 of the User Agreement.

<sup>9</sup> Ibid

"Trade Me" terms and conditions also state that "*Trade Me is not an auctioneer (whether under the Auctioneers Act 1928 or otherwise)*" and "*We do not act as agent for either party and do not participate in any sale or transaction between you and other members.*"<sup>10</sup> Users must accept (by click of a button) that they will be governed by these terms and conditions before using the sites.

Auctioneers selling property in New Zealand must be licensed and are subject to the rules in the Auctioneers Act 1928. "Auctioneer" in the Act means, "*a person licensed under this Act to carry on business as an auctioneer, and where the context requires includes a person authorised by a licence under this Act to conduct sales by auction*".<sup>11</sup> Section 32 of the Act makes it an offence to conduct a sale by auction without a licence. The definition of "sale by auction" is discussed below. It is clear that e-auction web sites such as "Trade Me" and "eBay" do not "conduct" the auction nor do they purport to be auctioneers. They merely provide a venue for the auction to take place and are not involved in the transaction between the buyer and seller. It is safe to conclude therefore that these e-auction websites are not auctioneers and are not subject to the Auctioneers Act in New Zealand. Such websites will also not be subject to other common law rules that may apply to auctioneers, including the laws of agency and bailment.

#### IV. IS AN E-AUCTION OF GOODS AN AUCTION?

In New Zealand it appears to be widely accepted that the CGA is excluded when goods are purchased by a consumer from a trader at e-auction, on the basis that the sale is "by auction".<sup>12</sup> The Motor Vehicle Disputes Tribunal of New Zealand is of the opinion that the CGA does not apply to sales of motor vehicles by e-auction. In decision MVD 93/2008 (AK) the Tribunal stated:

*"The Tribunal is satisfied that the purchaser bought the vehicle by online auction and thus the exception in section 41(3)(a) prevents her claiming against the trader for any breach of the guarantees in the CGA."*<sup>13</sup>

The Tribunal went on to deal with the case by applying the Fair Trading Act 1986 which is not excluded in auction sales. In *Williams v Hammer Auctions NZ Ltd*<sup>14</sup> the District Court dealt with a case involving the sale of a vehicle, by e-auction, which proved to be defective, by applying the Fair Trading Act because the buyer had accepted that the CGA did not apply. Consumer Magazine, in a contribution to the Sunday Star Times, also takes the view that the CGA does not apply to e-auctions of goods by traders selling to consumers.<sup>15</sup>

The specific question of whether an e-auction is really an auction at all has not been dealt with judicially and some commentaries note that the answer to this question is unclear. In May 2000 the Ministry of Economic Development released a discussion document relating to a proposed review of the Auctioneers Act 1928.<sup>16</sup> In that document it was noted that, "*opinions vary on whether competitive bidding processes on the internet actually are auctions, as opposed to a series of closed tenders*".<sup>17</sup> In the Guide to E-Commerce Law in New Zealand, produced by Simpson Grierson's x-tech group it is also suggested that e-auctions may be a series of closed tenders.<sup>18</sup> The uncertainty surrounding this issue is also mentioned by Dr K Kariyawasam in her article on online shopping where she says, "*It is unclear whether the Consumer Guarantees Act applies fully to the online environment, as s 41(3) says that nothing in the Act applies to sales by auction.*"<sup>19</sup> In order to determine whether an e-auction is an auction at all assistance can be gained from considering the definition of "auction" in the Auctioneers Act and also by discussing the traditional understanding of the term "auction".

#### V. THE AUCTIONEERS ACT 1928

The Auctioneers Act 1928 requires sales of property by auction to be conducted by licensed auctioneers. The Act sets out procedures for licensing, imposes certain duties on licensed auctioneers and provides some remedies for bidders when the Act is breached. The terms "sales by auction" and "sell by auction" are defined comprehensively in section 2 of the Act:<sup>20</sup>

*"Sales by auction or sell by auction means the selling of property of any kind, or any interest or supposed interest in any property, by outcry, by the auctioneer saying "I'll take" and commencing at a higher figure and going to a lower figure, by what is known as a Dutch auction, knocking-down of hammer, candle, lot, parcel, instrument, machine, or any other mode whereby the highest, the lowest, or any bidder is the purchaser, or whereby the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or where there is a competition for the purchase of any property or any interest therein in any way commonly known and understood to be by way of auction; and shall be deemed to include the selling of any property by outcry in any public place, as the same is defined in the Summary Offences Act 1981, or in any room, or mart, or place to which the*

<sup>16</sup> Ministry of Economic Development, *Auctioneers Act Review: Discussion Document*, Wellington 2000 – available at med.govt.nz

<sup>17</sup> Ibid page 2

<sup>18</sup> Simpson Grierson's x-tech group, "A Guide to E-Commerce in New Zealand", Brookers Ltd, 2002 at page 317

<sup>19</sup> Dr Kanchana Kariyawasam, "Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand", (2009) 15 NZBLQ 178 at page 191

<sup>20</sup> The definition of "sales by auction" in s 2 of the Motor Vehicle Sales Act 2003, "has the same meaning given to it by section 2 of the Auctioneers Act 1928".

<sup>10</sup> Available at: [www.trademe.co.nz](http://www.trademe.co.nz). See: clause 2.1

<sup>11</sup> s.2 Auctioneers Act 1928

<sup>12</sup> S.41(3)CGA

<sup>13</sup> MVD 93/2008 (AK) [2008] NZMVD 92 (30 May 2008) at p.4; see also MVD 019/07 (AK) [2007] NZMVD 44 (23 March 2007) at p.5

<sup>14</sup> [1997] DCR 92, decision upheld by the High Court in *Hammer Auctions NZ Ltd v Williams* HC 148/96 Auckland 10 April 1997 Morris J

<sup>15</sup> Consumer Magazine contribution to Sunday Star Times article, "How to Avoid Bidding Goodbye to Your Rights", 8 November 2009, page A8

*public are admitted or have access, whether or not the sale of the goods has been advertised to take place”.*

“Outcry” is defined in the Act<sup>21</sup> to include any indication that a bid has been accepted “in the presence of not less than 6 people”.

The definition is expressed in wide terms and is intended to cover all the different forms that an auction may take. Some commentaries have focused on the first part of this definition which refers to selling by “outcry” and have determined that it is unlikely that this definition covers e-auctions because it is impossible to know whether “not less than 6 people” are present when bidding is in progress.<sup>22</sup> However the second part of the “sale by auction” and “sell by auction” definition states “or where there is a competition for the purchase of any property or any interest therein in any way commonly known and understood to be by way of auction”. This part of the definition appears wide enough to cover e-auctions. This point is made by Dr K Kariyawasam in her article where she states:

*“The New Zealand Auctioneers Act 1928 does provide a broader definition of an “auction” – s 2 defines a sale by auction as covering not only a sale completed by methods such as knocking down of hammer, but also “a competition for the purchase of any property or any interest therein in any way commonly known and understood to be by way of auction” which would include online auctions”.*<sup>23</sup>

It seems that there is a good argument for asserting that the Auctioneers Act definition does cover “e-auctions” though such a method of auctioning was never in existence at the time the Act was drafted. However the provisions of the Act will not apply to e-auctions if there is no “auctioneer” involved. In the discussion above it was asserted that websites which facilitate the sale of goods by e-auction are not auctioneers because they do not “conduct” each auction. It would be impractical to impose the licensing regime established by the Act on such websites because there is no individual who controls each auction. The auctions are conducted by the buyers and sellers themselves. Any uncertainty in this area could be clarified by amending the definition “sale by auction” and “sell by auction” in the Auctioneers Act to exclude e-auctions which are not conducted or controlled by a specific individual commonly known as an auctioneer.

## VI. TRADITIONAL MEANING OF “AUCTION” AND LEGAL CONSEQUENCES

For a more general definition of “auction” assistance can be gained from the text, “Auctions Law and Practice” which states, in relation to the use of the word “auction” in the

Consumer Protection (Distance Selling) Regulations 2000 (UK), “... the word auction is not defined but we may take it as referring to a process whereby goods are sold to the highest bidder as a result of competitive bidding.”<sup>24</sup> This expression of the term “auction” makes no reference to the presence of an auctioneer and is wide enough to cover an e-auction. In The Laws of New Zealand<sup>25</sup> an auction is described as, “a bidding competition between buyers carried out by means of outcry”. The word outcry refers to an acknowledgement by the auctioneer that a bid has been accepted. The Oxford Dictionary of Law defines “auction” as, “a method of sale in which the parties are invited to make competing offers (bids) to purchase an item. The auctioneer, who acts as the agent of the seller until fall of the hammer, announces completion of the sale in favour of the highest bidder by striking his desk with a hammer (or in any other customary manner).”<sup>26</sup> Other traditional forms of auction such as Dutch auctions, where the auctioneer commences the auction by calling out a high price and then calls out lower prices until a buyer bids, and auctions which end on the burning out of a short candle, are generally controlled or conducted by an auctioneer.

These definitions highlight the significant difference between an e-auction and a traditional auction – that is the absence of a person acting as auctioneer in an e-auction. The involvement of an auctioneer has important legal consequences. The first of those is that the Auctioneers Act must be complied with. Secondly an auctioneer is generally acting as the agent of the seller and the law of agency applies. The third legally significant consequence is that an auctioneer of goods usually has possession of the goods being auctioned, the goods are held by the auctioneer as bailee and the buyer has the opportunity to inspect the goods before the auction commences.<sup>27</sup> None of these consequences are triggered in e-auctions. The absence of an auctioneer also means that there is no individual controlling the sale process, accepting bids and determining definitively when a sale has occurred. It is for these reasons that there is a good argument for asserting that an e-auction is not really an auction at all. The difference in the way in which the sale contract is formed in an e-auction compared with an auction which is conducted by an auctioneer supports this view.

## VII. CONTRACTUAL ANALYSIS

In a traditional auction which is conducted by an auctioneer it is generally agreed that a bid from a prospective buyer is an offer which may or may not be accepted by the auctioneer.<sup>28</sup> The sale to the highest bidder is complete when the auctioneer indicates that sale is complete by knocking down the hammer

<sup>21</sup> s.2 Auctioneers Act 1928

<sup>22</sup> Simpson Grierson's x-tech group, “A Guide to E-Commerce Law in New Zealand”, Brookers Ltd, 2002, p 317; New Zealand Law Commission Report 58, “Electronic Commerce – Part Two – A Basic Legal Framework” Nov 1999, at pages 14, 43-45

<sup>23</sup> Dr Kanchana Kariyawasam, “Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand, (2009) 15 NZBLQ 178 at page 192

<sup>24</sup> B.W. Harvey and Franklin Meisel, Oxford University Press, 2006 at page 23

<sup>25</sup> Available at <http://www.lexinexis.com/nz/legal>

<sup>26</sup> “Oxford Dictionary of Law” (3<sup>rd</sup> Ed). Oxford University Press, 1994, at page 32

<sup>27</sup> Maltby v Christie (1795) 1 Esp 340; 170 ER 378 and Skyway Service Station Ltd v McDonald [1986] 1 NZLR 366

<sup>28</sup> Payne v Cave (1789) 2 TR 148

or by other customary manner.<sup>29</sup> In *Barry v Davies*<sup>30</sup> it was held that in an auction without reserve there exists a collateral contract, between the auctioneer and the highest bidder, requiring the auctioneer to sell to that bidder. This collateral contract does not affect the creation of the contract between the buyer and seller which is only complete when the auctioneer knocks the goods down to a specific bidder.

In an e-auction there is no auctioneer physically present to determine when a sale is made and the widely held view that a bid is an offer may not apply. The e-auction website provider merely sends an email to the highest bidder confirming that he or she has won the auction and gives details of how to contact the seller. In an e-auction there is good reason for arguing that the display of goods for sale on the auction website is an offer to sell to the highest bidder, where any reserve is met, when the specified expiry time is reached. Such an offer is accepted by the person who is the highest bidder when the specified time is reached. Using this analysis, the contract is complete on the reaching of the time limit specified by the seller, as long as any reserve is met and a bid has been placed. This approach was taken by the Supreme Court of New South Wales in *Smythe v Thomas*<sup>31</sup> though the Court did acknowledge that an e-auction is a species of auction.<sup>32</sup> Rein AJ had to determine whether a contract to sell a Wirraway aircraft was created using the "eBay" e-auction website. The aircraft was listed by the seller with a starting price of \$150,000 and no reserve. The buyer placed the only bid of \$150,000 and was notified by "eBay" that he was the successful purchaser. The seller argued that in various telephone conversations before the bid was placed that he advised the buyer that he would not sell for this price. In order to determine whether a contract had been created the judge considered the "eBay" terms and conditions which both buyer and seller had agreed to be governed by before using the site. He noted that the terms and conditions specified that "eBay" is not an auctioneer and is not involved in the transaction between buyer and seller. He also referred to the "eBay" term which states that if the seller receives at least one bid at or above the stated minimum price (or in the case of reserve auctions, at or above the reserve price), the seller is obligated to complete the transaction with the highest bidder unless certain listed circumstances exist. This term does not give the seller the option of treating the highest bid like an offer and then deciding whether or not accept. In deciding that a contract for sale of the aircraft did exist Rein JA said:

*"In my view, the seller, by listing the Wirraway on eBay's site with an effective disclosed reserve of \$150,000 offered to sell the Wirraway to that bidder who..."*<sup>33</sup>

<sup>29</sup> s.59(2) of The Sale of Goods Act 1908 states, "A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner: until such announcement is made any bidder may retract his bid."

<sup>30</sup> [2000] 1 WLR 1962 (CA) discussed in Hawes, "Butterworths Introduction to Commercial Law" (2<sup>nd</sup> Ed) at p339 and see also: *Warlow v Harrison* (1859) 120 ER 920

<sup>31</sup> [2007] NSWSC 844 (3 August 2007)

<sup>32</sup> Ibid at para 35

<sup>33</sup> Ibid at para 39

Rein AJ continued by describing "that bidder" as the person who had made the highest bid, of at least \$150,000, on the expiry of the specified time period. The judge clearly identified the seller as being the offeror, in which case it is the buyer who may accept the offer by being the highest bidder at the specified time.

This contractual analysis is not consistent with the accepted method of creating a contract when an auctioneer is involved. This analysis, which suggests that it is the seller who makes the offer in e-auctions, is more akin to the making of "an offer to all the world" as recognised in the famous case of *Carlill v Carbolic Smoke Ball Co.*<sup>34</sup> In listing an item for sale on an e-auction site the seller is promising to sell to the person who has placed the highest bid at a specified point in time as long as any reserve has been met. The buyer accepts by being the highest bidder at the specified time. The terms and conditions of e-auction web sites generally state that this is how the sale is concluded. The "Trade Me" terms and conditions state, "For auctions you must sell to the highest bidder if the reserve price is met."<sup>35</sup>

The suggestion that an e-auction is a series of "competitive tenders"<sup>36</sup> is not particularly helpful because in a tender process the seller generally has the right to choose whether to accept any tender. In an online bidding situation the seller is bound to sell to the highest bidder at the specified point in time as long as any stated reserve has been met.

Adam Reynolds in his article, "E-auctions: Who Will Protect the Consumer?",<sup>37</sup> submits that the Australian Competition and Consumer Commission's advice that, an e-auction contract is formed once the bidder is informed that he or she has won the auction<sup>38</sup>, is correct. It is difficult to accept, in terms of contract negotiation, that the sending of a computer generated email without human intervention can signal the completion of a contract, particularly when the auction website has stated that it is not acting as agent for either party.

Whatever analysis is applied to the question of whether an e-auction is an auction at all, the issue is unclear and needs to be resolved – at least in terms of consumer law. It seems that there is a good argument for asserting that the term "auction" in the exclusions expressed in s.41(3) of the CGA should not be interpreted to include e-auctions. There are significant practical differences between e-auctions and traditional auctions which are conducted by an auctioneer. The most significant difference is the absence of a human auctioneer who controls the bidding and indicates decisively when a contract of sale is complete. It also seems that the accepted contractual analysis which applies to traditional auctions does not fit with e-auctions.

The conclusion that an e-auction is not really an auction at all is not accepted by Adam Reynolds in the article mentioned

<sup>34</sup> [1893] 1QB 256

<sup>35</sup> Para 4.2 (k). Trade Me, "Terms and Conditions" available at [www.trademe.co.nz](http://www.trademe.co.nz)

<sup>36</sup> See above footnote 17 and 18

<sup>37</sup> (2002) 18 JCL 75 at p.87

<sup>38</sup> See: ACCC, "Internet auctions: what you should know before you bid or sell", [http://www.accc.gov.au/pubs/Publications/Business\\_general/Ecommerce/internet\\_auctions.pdf](http://www.accc.gov.au/pubs/Publications/Business_general/Ecommerce/internet_auctions.pdf)

above. He states that, *"It is clear that an e-auction falls within the accepted boundaries of the concept of an auction."*<sup>39</sup> His conclusion is based on an assumption that an e-auction website provider is an "e-auctioneer" and a wide interpretation of the definitions of "auction" in two Australian Acts, being the Fair Trading Act 1999(Vic) and the Sale of Goods Act 1958(Vic). It is submitted above that an e-auction website provider in New Zealand is not an auctioneer. This finding is crucial to determining whether an e-auction is an auction at all.

#### VIII. RATIONALE FOR EXCLUDING CONSUMER RIGHTS IN AUCTION SALES

Consumer rights have long been excluded in auction sales. In the United Kingdom section 12 of the Unfair Contract Terms Act 1977 provides that contracting out of the terms implied by the Sale of Goods Act 1979 (which provide some consumer protection) is void if the sale is to a "consumer" – unless the sale is by auction. The United Kingdom Consumer Protection (Distance Selling) Regulations 2000(SI 2000/2334) do not apply to any sales concluded at auction. In Australia the consumer protection provisions implied into contracts for the sale of goods by the Trade Practices Act 1974 do not apply to auction sales.<sup>40</sup> New Zealand obviously followed suit when excluding the provisions of the CGA when supplies of goods are made by auction.<sup>41</sup> The provisions of the New Zealand Fair Trading Act 1986 do apply to sales by auction.

In order to determine whether the exclusion of consumer rights in e-auctions is justified, the rationale behind the traditional exclusion of consumer rights in consumer sales must be considered. The reasons for this exclusion are discussed by Professor R .M. Goode in "Commercial Law" where he states:<sup>42</sup>

*"There are good policy reasons for excluding auction sales. The seller at auction is frequently unable to undertake that the goods will comply with the statutory implied terms, as where the transaction is a forced sale by a sheriff or bailiff. It also may be difficult for the auctioneer to know whether the buyer is a business buyer or a private purchaser; and auction sales usually involve an element of speculation, making it undesirable to preclude contracting-out."*

Other reasons for excluding consumer rights in auction sales would include the fact that such sales were conducted by auctioneers and the legal consequences which were discussed above would follow. Buyers could take some comfort from the involvement of a licensed professional who is subject to the Auctioneers Act 1928 and other common law rules.

The policy reasons, discussed by Professor Goode, for excluding consumer rights in auction sales do not relate well

to e-auctions. Thousands of goods are sold daily at e-auction by traders who are able to comply with the guarantees in the CGA. They are not forced sales by bailiffs or sheriffs and traders who sell at e-auction can state that they do not intend to be bound by the CGA if goods are purchased by a business<sup>43</sup>. There may be an element of speculation in e-auctions but that alone is not a reason for excluding consumer rights.

The fact that a consumer, buying goods through an e-auction site, who clicks on a "buy now" button is covered by the CGA while a consumer who places bid and becomes the successful purchaser is not covered by the CGA is totally unsatisfactory. Consumer Magazine, in a contribution to the Sunday Star Times, identified a practice which is becoming common among traders, selling goods on e-auction sites, which is aimed solely at avoiding the application of the CGA.<sup>44</sup> This practice involves the listing of goods for sale on an e-auction site with a starting bid of one dollar less than the "buy now" price. The intention of the trader is to entice the buyer into placing a bid rather than using the "buy now" option because the trader wants to avoid application of the CGA. This practice is unscrupulous and should not be allowed to continue. The inconsistency in remedies available to consumers depending on whether they buy after placing a bid or clicking on a "buy now" button is unacceptable and reform is needed.

#### IX. CONCLUSION – TIME FOR REFORM

The law relating to consumer rights in e-auctions needs clarification in two areas. The first involves clarifying whether e-auction sites are acting as auctioneers. It would not be practical to impose the requirements of the Auctioneers Act 1928 on e-auction sites because of the absence of an individual auctioneer conducting each auction. Any confusion over whether the Auctioneers Act currently applies to e-auction sites could be removed by amending the definition of "sale by auction" and "sell by auction" in that Act to exclude auctions that are not conducted and controlled by an individual person other than the buyer and seller.

The second area in which the law should be reformed relates to the exclusion of the CGA when goods are purchased at e-auction. While there is a good argument for asserting that an e-auction is not at auction at all, because of the absence of an auctioneer, this point has not specifically been determined by a Court and reform is needed. The exclusion of the CGA in e-auctions is not justified because there is no auctioneer controlling each e-auction and the rationale discussed above for excluding consumer rights in traditional auction sales do not apply to e-auctions. Consumers buying goods from traders after bidding on an e-auction site should be given the same protections available to those who buy using the "buy now" option on the same site. The CGA should be amended so that the CGA is not excluded when goods are purchased by consumers through an e-auction. This could be achieved by providing that the reference to "auction" in section 41(3)(a) of

<sup>39</sup> (2002) 18 JCL 75 at p84

<sup>40</sup> Section 70 and 71 Australian Trade Practices Act 1974

<sup>41</sup> S.41(3) CGA

<sup>42</sup> R.M. Goode, "Commercial Law", (4th Ed, edited and fully revised by Ewan McKendrick) LexisNexis and Penguin Books Ltd 2009, at page 358

<sup>43</sup> S.43 CGA

<sup>44</sup> Consumer Magazine contribution to Sunday Star Times article, "How to Avoid Bidding Goodbye to Your Rights", 8 November 2009, page A8

the CGA relates only to auctions conducted by a licensed auctioneer. "Auction" could be defined in this manner in the definition section of the Act.

The Ministry of Consumer Affairs has advised that it is currently undertaking a major review of consumer law including the Auctioneers Act 1928. This has been referred to by the Minister as the "One Door, One Law" project.<sup>45</sup> The Ministry is planning to release a discussion paper in April 2010. This will be an opportune time to consider the reforms suggested above.

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- [15] Ministry of Economic Development, Auctioneers Act Review: Discussion Document, Wellington 2000 – available at [med.govt.nz](http://med.govt.nz)
- [16] Ibid page 2
- [17] Simpson Grierson's x-tech group, "A Guide to E-Commerce in New Zealand", Brookers Ltd, 2002 at page 317
- [18] Dr Kanchana Kariyawasam, "Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand", (2009) 15 NZBLQ 178 at page 191
- [19] The definition of "sales by auction" in s 2 of the Motor Vehicle Sales Act 2003, "has the same meaning given to it by section 2 of the Auctioneers Act 1928".
- [20] s.2 Auctioneers Act 1928
- [21] Simpson Grierson's x-tech group, "A Guide to E-Commerce Law in New Zealand", Brookers Ltd, 2002, p 317; New Zealand Law Commission Report 58, "Electronic Commerce – Part Two – A Basic Legal Framework" Nov 1999, at pages 14, 43-45
- [22] Dr Kanchana Kariyawasam, "Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand", (2009) 15 NZBLQ 178 at page 192
- [23] B.W. Harvey and Franklin Meisel, Oxford University Press, 2006 at page 23
- [24] Available at <http://www.lexisnexis.com/nz/legal>
- [25] "Oxford Dictionary of Law" (3rd Ed). Oxford University Press, 1994, at page 32
- [26] Maltby v Christie (1795) 1 Esp 340; 170 ER 378 and Skyway Service Station Ltd v McDonald [1986] 1 NZLR 366
- [27] Payne v Cave (1789) 2 TR 148
- [28] s.59(2) of The Sale of Goods Act 1908 states, "A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner: until such announcement is made any bidder may retract his bid."
- [29] [2000] 1 WLR 1962 (CA) discussed in Hawes, "Butterworths Introduction to Commercial Law" (2nd Ed) at p339 and see also: Warlow v Harrison (1859) 120 ER 920
- [30] [2007] NSWSC 844 (3 August 2007)
- [31] Ibid at para 35
- [32] Ibid at para 39
- [33] [1893] 1QB 256
- [34] Para4.2 (k). Trade Me, "Terms and Conditions" available at [www.trademe.co.nz](http://www.trademe.co.nz)
- [35] See above footnote 17 and 18
- [36] (2002) 18 JCL 75 at p.87
- [37] See: ACCC, "Internet auctions: what you should know before you bid or sell", [http://www.accc.gov.au/pubs/Publications/Business\\_general/Ecommerce/internet\\_auctions.pdf](http://www.accc.gov.au/pubs/Publications/Business_general/Ecommerce/internet_auctions.pdf)
- [38] (2002) 18 JCL 75 at p.84
- [39] Section 70 and 71 Australian Trade Practices Act 1974
- [40] S.41(3) CGA
- [41] R.M. Goode, "Commercial Law", (4th Ed, edited and fully revised by Ewan McKendrick) LexisNexis and Penguin Books Ltd 2009, at page 358
- [42] S.43 CGA
- [43] Consumer Magazine contribution to Sunday Star Times article, "How to Avoid Bidding Goodbye to Your Rights", 8 November 2009, page A8
- [44] See: Speech made by Hon Heather Roy 30 November 2009 <http://www.beehive.govt.nz/speech/039one+law+-+one+door039+consumer+transactions+1>

<sup>45</sup> See: Speech made by Hon Heather Roy 30 November 2009 <http://www.beehive.govt.nz/speech/039one+law+-+one+door039+consumer+transactions+1>