



Consumer Law Reform Additional Paper – November 2010

Auctions, Auctioneers and the Consumer Guarantees Act

Introduction

- 1 In June 2010, the Ministry of Consumer Affairs released the discussion paper “Consumer Law Reform”, which included discussion on the regulatory regime for auctioneers and auctions (see in particular pages 85 to 101 of the discussion paper). A number of submissions on this discussion paper were received, including from auctioneers and consumers. These submissions have been considered and further analysis of auction regulation undertaken. This paper summarises the further analysis and our recommendations for the regulation of auctions and auctioneers.
- 2 Under present law, auctioneers are regulated under the Auctioneers Act 1928. There are also rules about the conduct of auctions in section 59 of the Sale of Goods Act 1908 (with respect to auctions of goods) and section 42 of the Property Law Act 2007 (with respect to auctions of land). The Sale of Goods Act generally and the Fair Trading Act also apply to auctions. Auctions are specifically excluded from the coverage of the Consumer Guarantees Act.
- 3 The discussion paper raised several issues with the current regulatory regime, including:
 - a The licensing of auctioneers - the current licensing of auctioneers is unusual.
 - b The conduct of auctions - there is uncertainty and potentially a need to update the rules for conducting auctions.
 - c The application of the Consumer Guarantees Act to auctions, in particular, to internet auctions (such as Trade Me sales).

Licensing of Auctioneers

Discussion Paper

- 4 Auctioneers are currently regulated by the Auctioneers Act 1928. This Act provides for the occupational regulation of a person selling property by auction (an auctioneer). A licence is required to authorise the holder to carry on business as an auctioneer (section 24), and it is an offence for any person to conduct any sale by auction (section 32), or to hold themselves out to be an auctioneer without a licence (section 33).

- 5 The discussion paper noted a number of unusual aspects with respect to the current licensing of auctioneers, including:
- a the Auctioneers Act places the discretion about whether a person is fit and proper to deal with people's property and money with the District Court, but it would be more usual for a specific licensing authority or registrar to carry out this function;
 - b there is no centralised "register" of all licensed auctioneers;
 - c charity fundraising auctions are technically caught under the Auctioneers Act, but it is not unusual for auctions of low value or donated goods for fundraising purposes to be conducted by people who are not licensed auctioneers. This aspect of the Act is not enforced in practice, and there is a question as to whether the requirement for community and charity fundraising auctions to be carried out by licensed auctioneers is necessary or appropriate;
 - d aspects of the current licensing system seem to be either unusual or archaic, e.g. councils receiving part of the annual licence fee to compensate for removing effluent from streets and the requirement for a \$1,000 fidelity bond.
- 6 The discussion paper noted that, given the compliance costs, it is important to only intervene where the potential harm would be significant. Thus the primary issue is whether there is a possibility that incompetent or dishonest service by auctioneers could result in significant harm to the consumer and/or a third party and what is the nature of the risk of significant harm. The paper discussed that the most significant of the potential harms are likely to arise where the auctioneer fails to account to the seller for proceeds of sale, or sells stolen goods. Other potential harms (e.g. potential manipulation of the auction process by the auctioneer and the auctioneer selling items for lower prices than could have been obtained) were also noted.
- 7 The discussion paper did not reach any particular conclusions regarding whether licensing of auctioneers is appropriate. It was noted that, if it is considered that the risks are sufficient to justify continued occupational regulation, there are four possible options:
- a licensing by a specialist licensing authority along modern lines requiring the meeting of defined competency standards;
 - b a negative licensing regime such as that for motor vehicle traders under the Motor Vehicle Sales Act 2003;
 - c including licensing of auctioneers alongside secondhand dealers and pawnbrokers under the Secondhand Dealers and Pawnbrokers Act 2004 (which is a specific form of a modern negative licensing system); and
 - d an industry-led licensing approach with an approved industry body.

- 8 The discussion paper noted that it would be desirable for there to be one definition of “auction” that applied both to the licensing of auctioneers and to the exemption of auctions under the Consumer Guarantees Act. The paper proposed a new definition of “auction” that restricted auctions to those auctions conducted by a natural person.

Submissions

- 9 Many of the submissions received on the discussion paper did not comment on the licensing of auctioneers. However, the majority of those that did comment considered some form of licensing was necessary. The preference was for a form of negative licensing. Intervention was considered appropriate due to the potential for auctioneers to cause harm in their day to day business through inappropriate dealings with other people’s property, other people’s money or the auction conduct.
- 10 Most of the submissions agreed that the current approach of a licensing system administered by District Courts was inefficient (with one suggesting it is not reliable to have licensing considered by “57 different courts ... which means 57 different Deputy Registrars which means 57 different District Court Judges.”)
- 11 Only one submitter was in favour of industry-led licensing, suggesting it would be more common sense and would reduce compliance costs.
- 12 One submitter suggested licensing of auctioneers should not be required, which is the approach taken in Victoria and New South Wales.
- 13 The majority of submitters felt there was a valid distinction between traditional auctions and online auctions. Many submissions supported the definition of auction proposed in the discussion paper, with a few submitters proposing some amendments to that definition.

Further Analysis

Is licensing required?

- 14 The appropriate licensing regime for auctioneers has been considered, taking into account submitter feedback. The analysis has included considering the Ministry of Economic Development’s *Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations* (the “Framework”). The analysis against this Framework is summarised in Appendix 1.
- 15 From this analysis continuing with some form of licensing is considered appropriate because:
- a significant harm could potentially be caused to:
 - i individuals selling or purchasing at auctions by auctioneers failing to account to vendors for the proceeds of sales;
 - ii by auctions being used as a mechanism to sell stolen goods;

- iii by auctions being used to sell goods without clear title; or
 - iv by manipulation of the auction so that lower prices are obtained;
- b mechanisms (other than licensing or registration) are unlikely to sufficiently protect consumers and third parties from the potential harm;
 - c licensing has been required for 80 years and submitters were largely in favour of retaining some form of licensing (including negative licensing or registration);
 - d other occupations whose conduct gives rise to similar risks are also licensed (i.e. occupations who sell goods on behalf of a vendor, such as real estate agents, motor vehicle traders and pawnbrokers) and it is appropriate to have a reasonable degree of parity between occupations that have a similar potential to cause harm. Given the other licensing requirements it may create market distortions if there were no licensing requirements for auctioneers; and
 - e an updated licensing regime would be likely to improve outcomes (compared with either a deregulated market or the status quo).
- 16 The arguments for continued licensing do not support positive licensing especially when compared to occupations that could result in harm such as death or physical disability. There is justification, however, for negative-licensing or registration of auctioneers. The scope of registration is discussed below.

Scope of licensing

- 17 The appropriate scope of the licensing regime has been considered taking into account the existing provisions in the Auctioneers Act and provisions in other licensing arrangements (especially the Secondhand Dealers and Pawnbrokers Act and the Motor Vehicle Sales Act).
- 18 The analysis suggests the following legislative provisions are appropriate:
- a Registration requirements as follows –
 - i Registration requirements broadly similar to Part 3 of the Motor Vehicle Sales Act and Part 2 of the Secondhand Dealers and Pawnbrokers Act. Legislation should require each auctioneer to be registered but provision should also be made for registration in the name of a body corporate auction house (e.g. Turners Auctions) and for individual auctioneers to be endorsed on that corporate registration.
 - ii Each person seeking registration (or endorsement) should be required to sign a statutory declaration that they are not disqualified from registration.

- iii Full contact details and specified information (e.g. the registered office of the auctioneer) should be required to be submitted in support of the registration application.
 - iv A person should be disqualified from registration according to similar grounds to those in section 22 of the Secondhand Dealers and Pawnbrokers Act and section 24 of the Motor Vehicle Sales Act (e.g. if convicted of an offence under the Crimes Act 1961, Fair Trading Act or other similar legislation, or if under the age of 18 years or if the person has previously had, or managed a company that has had, an auctioneer or motor vehicle registration or a secondhand dealer or pawnbrokers or real estate certificate or licence cancelled or refused in the past 5 years).
 - v Police checks would be obtained to verify there are no convictions that would disqualify the person from registration.
- b Given the potential impact to a person's occupation, providing that applicants who are declined registration may appeal to the District Court (similar to section 64 of the Motor Vehicle Sales Act).
- c A specific process for renewal of registration and payment of registration fees.
- d Minimum obligations for registered auctioneers, including:
 - i consistent with the current legislation, a requirement to account for the proceeds of sales by auction within a maximum of 14 days (excluding public holidays) of the auction date.
 - ii misappropriating goods or proceeds, theft or falsifying accounts would be an offence.
 - iii record keeping obligations would be specified.
 - iv a requirement to display notices, produce copies of registration on request etc; and
 - v a restriction on selling contrary to the legislation.
- e Specification of offences for failing to comply. It is noted that the current offences in the Auctioneers Act are outdated (e.g. fines from \$10 to \$200) and need to be increased such that the fines provide an effective deterrent. Offences against the Secondhand Dealers and Pawnbrokers Act range up to \$10,000 and in relation to the Motor Vehicle Sales Act up to \$50,000 for an individual and \$200,000 for a corporate. Given the potential value of goods being sold at auction, parity with the offences for motor vehicle sales and motor vehicle traders is considered appropriate.
- f Appointment of a registrar responsible for the registration process and for maintaining a central register of registered auctioneers accessible to the public, police and relevant authorities.

- g Providing (as in the Auctioneers Act) for appropriate recognition of licences or registration issued under other licensing regimes (e.g. regimes for motor vehicle dealers and real estate agents). One submitter noted that section 34 of the Auctioneers Act (which makes it an offence to let out, hire, or lend an auctioneer's licence to any person; or for someone to trade with another person who has had such a licence let, hired, or lent to them except as authorised) should be expanded so that it is not an offence for a licensed auctioneer to have an arrangement with a person that is licensed under another Act in relation to goods or property that that person is able to auction under that other Act. We consider it appropriate to retain provisions similar to section 34, but to ensure its coverage addresses the concerns raised.
- h Allowing regulations that prescribe registration fees and other process type matters. Section 43 of the Auctioneers Act which provides for the making of regulations (such as the current Auctioneers Regulations 1958) should be retained and expanded as per section 84 of the Secondhand Dealers and Pawnbrokers Act (to allow for the making of regulations for the purpose of prescribing the procedure for, and making of other provisions relating to, the conduct of public auctions for the purposes of this Act).
- 19 Before any changes to the legislation would come into effect there would be a transitional period to ensure auctioneers licensed under the current Auctioneers Act are not required to also be registered under the new licensing requirements until their current licences expire.
- 20 Also a number of consequential amendments would be required to legislation that refers to the Auctioneers Act.

Exemptions from licensing arrangements

- 21 A number of statutes specifically exempt certain sales from a requirement to use a licensed auctioneer (e.g. sales by police of unclaimed property). It is appropriate that these exemptions continue to be recognised. In addition, we recommend certain fundraising auctions and internet auctions should be exempted.
- 22 There would be benefit in exempting most fundraising auctions from the requirement that the auctions be conducted by a licensed auctioneer, as the compliance costs for such auctions likely outweigh the justification of requiring a licensed auctioneer. However, where the goods are of a high value it is arguably appropriate for a licensed auctioneer to supervise the auction.
- 23 A similar problem was identified in the development of the Gambling Act 2003. It was recognised it would be impractical to legislate that fundraising raffles and similar games could not be conducted without a gambling licence. In that Act, a "society" (which is defined as "an association of persons established and conducted entirely for purposes other than commercial purposes") is not required to obtain a licence for gambling where the total value of prizes offered / awarded to the winners of the activity does not exceed \$5,000 and where the potential

turnover involved in the activity does not exceed \$25,000 per occasion. A society is non-commercial if it is established and conducted for charitable purposes for the purpose of enabling participation in, or of supporting, sport, athletics or a cultural activity, or for any other non-commercial purpose other than that of private gain.

- 24 A similar approach would be suitable for fundraising auctions. Accordingly, we recommend that each auction conducted solely for the benefit of a “society” (as per the Gambling Act definition) is not required to be conducted by a registered auctioneer if each lot has a market value or estimated sale price of less than \$5,000 and the total auction has a market value or estimated sale price of up to \$25,000.
- 25 We recommend that the values be cumulative. For example, a school could potentially hold raffles or other games covered by the Gambling Act of up to \$25,000 and a fundraising auction of estimated values of up to \$25,000 without requiring either a gambling licence or the services of a licensed auctioneer.
- 26 In relation to internet auctions, it is necessary to consider whether it is appropriate to require either the internet auction provider and/or the individual sellers to be registered.
- 27 In relation to internet auction providers, we understand that many providers do not technically act in the role of auctioneer. It follows that if an internet auction provider is not acting as an “auctioneer”, it seems counterintuitive to require the provider to be registered as an auctioneer. For example, Trade Me’s Terms and Conditions are agreed to by all members, including those selling and purchasing, and state that Trade Me does not act as an auctioneer, as follows:

The services: Trade Me provides a venue to introduce members who want to buy and sell items. Trade Me does not take any part in the sale of items other than by providing our Website as a venue for members. If a bid is accepted by a seller, a contract of sale will be formed between the buyer and the seller directly. We do not act as agent for either party and do not participate in any sale or transaction between you and other members ... As a result, even though some of the services are being referred to as an auction, Trade Me is not an auctioneer (whether under the Auctioneers Act 1928 or otherwise)...

- 28 However, auctioneers also establish internet sites to complement their traditional “in-person” auctions to expand the number of potential bidders (for example, Turner’s Auctions run a number of these hybrid auctions through their site “Turners Live”). For these “hybrid” type auctions the requirements that the auction is conducted by a registered auctioneer should apply.
- 29 In relation to Trade Me type providers (individuals and suppliers using Trade Me to undertake their own auctions), the potential harm that justifies the licensing of auctioneers is not likely to arise to the same degree as with traditional auctions. Harm is unlikely to arise through a failure to account for the proceeds of a sale, as purchasers typically pay the vendors directly. In relation to the potential for the auction process to be used to sell stolen goods, we note this has already been addressed by legislation. Section 69 of the Secondhand Dealers and Pawnbrokers Act requires internet auction providers to keep records of sales.

Finally, Trade Me has over 2.65 million registered users and it would be impractical to require all users listing on Trade Me to become registered auctioneers.

- 30 Accordingly, where an internet auction provider is merely providing a platform to introduce buyers and sellers we do not consider registration of the provider as an auctioneer or of the “traders” selling via that provider’s internet platform is justified.
- 31 There is scope for consumers to be confused and it should be incumbent on auction websites (such as Trade Me and Turners Live) to make it plain to purchasers whether or not the purchaser is contracting with the internet auction provider (on behalf of the vendor) or with the vendor directly. The terms and conditions of the website will need to be clear and agreed to by all that trade on the site. If the purchaser contracts with the internet auction provider or the internet auction provider receives payment on behalf of the vendor, the provider will need to be a registered auctioneer.

Definition of auction

- 32 The discussion paper proposed there should be a more modern definition of the term “auction”. The Auctioneers Act 1928 defines “sales by auction” and “outcry” as:

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

Outcry includes any request, inducement, puff, device, or incitement made or used by means of signs, speech, or otherwise in the presence of not less than 6 people by any person for the purpose of selling any property offered or available for sale, whether such property is or is not the same as that shown or referred to by him when making or using such request, inducement, puff, device, or incitement.

- 33 The term “auction” as used in everyday language refers to any method of sale in which goods, property or services are sold to the highest bidder and where during the bidding process there is transparency regarding the bids being made. For example, the term auction is used in the context of traditional auctions conducted by licensed auctioneers, online auctions and for other auction types, such as silent auctions.
- 34 The definition of auction should be technology neutral (i.e. the same rules should apply regardless of whether an auction is conducted in person, online or by other

means (e.g. an auction where online, telephone and in person bidders can participate).

35 The discussion paper proposed a definition of auction that restricted auctions to those conducted by a natural person. Further, consideration has been given to whether the natural person aspect of the definition is required. Rather than include a narrow definition of auction, it is more appropriate for the legislation to exempt types of auctions that are not subject to the licensing arrangements (as discussed above). There also does not seem to be justification that auctions should require a minimum number of attendees, provided members of the public are not unreasonably restricted from attending or participating in auctions.

36 We recommend a definition of auction along the following lines is included in the legislation:

An auction is the sale of any property including goods, land or services of any kind to the highest bidder. An auction includes any process commonly known and understood to be by way of auction:

- which commences when the person conducting the auction invites a first bid from persons participating in the auction; and
- where bidders may bid in person, via telephone or through the internet or any other means, provided each bidder can participate in real time in the auction being conducted.

Administration of the recommended licensing regime

37 We recommend that the Ministry of Economic Development administer the registration of auctioneers. The Ministry operates a number of licensing and registration regimes (for example, in relation to companies, incorporated societies, motor vehicle traders, financial service providers) and is an experienced and efficient provider of register services.

38 Based on discussions, it would be straightforward for the Ministry to establish and run a new online register at a reasonable cost. The registration arrangements and register could be internet-based and similar to registers that the Ministry's Business Services Branch runs for other occupations.

39 Estimated cost information has not yet been provided, however, based on initial discussions and an estimate of at least 350 auctioneers being registered it is reasonably likely that a fee similar to the current annual auctioneers licensing fee is achievable. The current fees are prescribed in the Auctioneers Regulations as \$300 for the annual licence fee, with an additional fee of \$130 to add the name of a person authorised to conduct sales by a company or \$130 to add each additional place of business.

40 The online register could also be used as a platform to provide information on the registration process and general information on auctions and conduct at auctions.

Structure of legislation

- 41 It is undesirable to have a number of statutes that each details some of the requirements in relation to auctions. Currently specific provisions regarding auctions are included in the Sale of Goods Act, Property Law Act and Auctioneers Act. In addition, recent case law on auctions was brought by the Commerce Commission under the Fair Trading Act (see discussion below).
- 42 We recommend repealing the Auctioneers Act and bringing the statutory requirements for auctions together in the Fair Trading Act. Elsewhere in this paper we propose amendments that would transfer the auction provisions in section 59 of the Sale of Goods Act and section 42 of the Property Law Act to the Fair Trading Act. Consistent with these amendments, we consider it would be desirable to include a Part on auctions in the Fair Trading Act and attach as a Schedule to that Part the recommended registration obligations and arrangements.¹
- 43 In reaching this decision consideration was given to:
- a whether to amend the Auctioneers Act, rather than repeal it. However, consistent with the Government's regulatory reform objectives, there is benefit in streamlining the statute books and having the auction provisions in one piece of legislation.
 - b whether to piggyback the registration of auctioneers onto the Secondhand Dealers and Pawnbrokers Act (in a new part of the Act, for example). However, although secondhand dealers and pawnbrokers give rise to similar potential for harm and justify similar licensing arrangements, the industries are quite different and it may be perceived as illogical to group them into a single piece of legislation.

Conduct of Auctions

Discussion Paper

- 44 The discussion paper noted that the Auctioneers Act is largely silent on how auctions are to be run. Section 59 of the Sale of Goods Act and section 42 of the Property Law Act provide for some aspects of the auction process and auctions are subject to agency and contract law, and to the civil jurisdiction of the courts. Certain provisions from the United Kingdom's Auctions (Bidding Agreements) Act 1969 were also raised in the discussion paper as a possible option for New Zealand.

Submissions

- 45 Most submitters believed that the current rules were inadequate and needed updating to account for changes in technology since the relevant Acts had come into force. However, submitters did not generally provide detailed comments on the precise changes that they considered should be made.

¹ There are indications only. Drafting of legislation is undertaken by the Parliamentary Counsel Office.

- 46 Auctioneer views differed. Two industry submissions were of the opinion that the Sale of Goods Act, in its present form, was sufficient and appropriate for today's commercial climate. These submissions considered the legislative environment had worked well for the past 80 years and saw no reason to change the rules concerning the conduct of auctions. However, other auctioneers noted misleading practices used by some in the industry (e.g. vendor bidding) and supported changes.
- 47 Only one submission expressly supported including a provision that would restrict bidding agreements similar to the provisions in the UK Bidding Agreements Act. However, a number of submissions (including industry and consumer groups) commented on vendor bids and other concerning auction practices (including bid rigging, sham auctions and "no reserve" auctions that open with a minimum bid). A handful of submissions specifically referred to the 2004 Court of Appeal case *Commerce Commission v Grenadier Real Estate*, where the Court indicated that each vendor bid should be specifically identified to avoid breaching the Fair Trading Act.

Further Analysis

- 48 Under the Fair Trading Act all auctions performed in trade must be conducted in a manner which does not mislead or deceive.
- 49 There has developed a practice with a number of auctioneers (and traders in general) who aim to create a "fun" selling environment, and we have no concerns with this. A problem arises, however, with any auction practice which is more in the manner of a misleading theatrical performance. There is a particular concern in this regard about vendor bids.
- 50 There are current protections in the Sale of Goods Act, Property Law Act and Fair Trading Act in relation to vendor bids. We note, however, the following comments of the Court of Appeal:²

"We can see nothing misleading or deceptive in the making of successive or multiple vendor bids by an auctioneer (or other person acting on behalf of a vendor) provided that the right to do so has been expressly notified and that every such bid is able to be recognised by the members of the relevant section of the public for what it is. ...

... it seems to us that where it is the auctioneer who is to make any bids for the vendor, it is likely to mislead or deceive intending purchasers if that is not done in a manner which makes it clear whether a particular bid is being received from a bidder on the floor of the auction room or is being made by the auctioneer on the vendor's behalf. ... Clarity in this respect could be achieved in a number of ways. No particular language would be needed. It would not, for instance, be necessary to use the words "vendor's bid" or the equivalent on each occasion of lodging such a bid. Some degree of shorthand which does not have a tendency to mislead would suffice, such as the expressions ... "The bid is with me" or "I have the bid now" ... [which] would not be likely to mislead an intending purchaser with a reasonable degree of common sense who had been made aware of the possibility of multiple vendor bidding by the auctioneer.

² *Commerce Commission v Grenadier Real Estate Limited* [2004] 2 NZLR 186. paras 43 to 45.

We are conscious of ... evidence that vendor bidding is a useful technique by which bids are elicited from people who are deliberately holding back for the moment ... [and a belief] that if each vendor bid has to be specifically identified it will destroy the flow and momentum of the auction. That may be so. But in no other field of "trade" falling within s 9 is a practice which is likely to mislead or deceive a purchaser permitted merely because it will make the selling process easier. Auctions, like other sales, must be conducted in a manner which does not mislead or deceive, and if this means that auctioneers' practices must change, then so be it. Plainly it will be misleading to create the illusion of real competition where there is none."

- 51 One auctioneer in its submission on the discussion paper commented that the Court of Appeal did "not provide a practical procedure when there are many lots to be sold" as "prospective purchasers do not wish to hear an announcement repeated 200 times each day". That submitter suggested "it should be sufficient that the matter is dealt with in the conditions of sale and included in announcements at the commencement of the sale".
- 52 However, other submitters expressed concerns with vendor bidding practices. A different auctioneer commented that the practice of not disclosing vendor bids at the time they are made is generally frowned upon and that reputable auctioneers will inform bidders when the auctioneer is making a bid by or on behalf of the vendor. Some refuse to allow vendor bids at all during auctions.
- 53 In our view, undisclosed vendor bids are misleading or deceptive. As the Court of Appeal has found it is misleading to create the illusion of real competition when there is none.
- 54 It is difficult to see how the use of a phrase such as "the bid is with me" in such scenarios would represent an overly impractical procedure, especially considering vendor bids should only be necessary where bids from the floor are not flowing quickly.
- 55 It appears from the submissions and media reports that multiple vendor bids in succession remain a common behaviour in some auctions. A reasonable consumer would be unlikely during an auction to appreciate that multiple vendor bids in succession are occurring merely from the inclusion of a phrase such as "the vendor reserves a right to bid" stated somewhere in the terms and conditions of sale. This is the context for the Court of Appeal finding that it is appropriate that the auctioneer should identify bids in a manner which makes it clear to a person with a reasonable degree of common sense whether a particular bid is being received from a bidder on the floor or is being made on the vendor's behalf.
- 56 Where a reserve price is set, we consider that the ability to make a vendor bid should only apply until the reserve price is met. The ability to set a reserve price is the valid mechanism by which a vendor can protect themselves from a low sale price. Vendor bids at or above the reserve price are misleading as they have a tendency to inflate the perceived market price.
- 57 Similarly, for "no reserve" auctions it is difficult to see a role for vendor bids. The placing of a vendor bid would mean that the "no reserve" advertising was misleading. We considered whether in such scenarios it is necessary for the

auctioneer to have a mechanism to commence the auction with a vendor bid. However, for no reserve auctions this is not considered necessary and the usual practice would be for auctioneers to propose, rather than make, an opening bid (e.g. do I have \$100?, will someone bid me \$50? etc).

- 58 Restricting vendor bids above the reserve price appears to have some support from industry practices, including from:
- a auctioneers that do not allow any vendor bids; and
 - b the Real Estate Institute of New Zealand (REINZ) Auction Code of Practice, which limits the ability for vendor bids in real estate sales to “any level below the reserve price at the auction” and specifically states that “under no circumstances will a bid by or on behalf of the seller be exercised by the auctioneer at or in excess of the seller’s reserve price”. In addition, the REINZ Code states, “Where the seller does not provide the auctioneer with a written reserve prior to the auction, the auctioneers shall announce that the property is to be sold without reserve and no bid shall be made by or on behalf of the seller at the auction”.
- 59 Where goods or property is passed in at auction, it would be misleading for post-auction advertising for the goods or property to refer to any vendor bid made at the auction. This appears to be the approach taken by the Commerce Commission and courts to date in enforcing section 9 of the Fair Trading Act.
- 60 Arguably, the current drafting of the Fair Trading Act already sufficiently protects against such misleading advertising. However, given the other specific proposals on auctions, it is suitable, in the interests of clarity, that post-auction advertising also be addressed.

Auctions and the Consumer Guarantees Act

Discussion Paper

- 61 The discussion paper compared traditional auctions and “online auctions”, such as those conducted by the Trade Me and eBay websites, and noted there is some confusion regarding the extent to which the Consumer Guarantees Act applies to online auctions.
- 62 The Consumer Guarantees Act applies to sales to consumers by persons in trade, but excludes auctions and competitive tenders (see section 41(3)). This means the Consumer Guarantees Act applies to Trade Me sales by traders to consumers concluded using a “buy now” process but arguably not sales via a bidding process. For consumers and suppliers, the fact that the Consumer Guarantees Act may or may not apply depending on the transaction method is likely to be confusing and illogical.

Submissions

- 63 The vast majority of submissions considered that the application (or not) of the Consumer Guarantees Act should not depend on the method of sale, and that

the Consumer Guarantees Act should apply to Trade Me type sales where a person in trade sells to a consumer. Submitters generally believed the current situation is uncertain and in need of clarification.

- 64 However, one car dealer stressed the need for traders to have access to an "as is, where is" sale mechanism, in particular for "trade-in" cars. This dealer argued that Trade Me sales should not be subject to the Consumer Guarantees Act.
- 65 A number of the submissions discussed the ability in a genuine auction context to preview goods prior to the auction commencing and considered this was relevant to whether the Consumer Guarantees Act should apply. However, views on this differed. For example:
- a Some submitters noted that prior to an auction the ability to inspect the goods supports that auctions should be on an "as is, where is" basis. However, in the case of online goods there is usually no ability to inspect the goods prior to purchase and so the guarantees in the Consumer Guarantees Act are important for such online auctions.
 - b Other submissions took the opposite view and considered that in relation to auction sales there is often a limited time to preview the goods and often others are trying to look at the same goods at the same time. In comparison, for online auctions, a description is on the website for about two weeks and, in addition to the photo and a description, there is an ability to ask questions of the seller.
 - c Another submission considered that the consumer's inspection right is not significantly greater in relation to auctions, online sales, online auctions or physical purchases from a store.
- 66 A few submissions argued that the Consumer Guarantees Act should apply for all sales, including online auctions and traditional auctions. For example, Trade Me could not see any rationale for the exclusion of competitive tenders and auctions and considered the exclusion should be removed. Trade Me noted that, if the rationale for exempting auctions was that auctions were trader to trader and limited to people who had inspected the items, these things have changed.
- 67 Trade Me also noted that, to fill the gap left by having no Consumer Guarantees Act protection, it developed in 2007 a Code of Conduct that holds professional sellers to a similar standard as the Consumer Guarantees Act. However, when disputes occur, the Disputes Tribunal takes the approach that the Consumer Guarantees Act does not apply to online auctions, and therefore claims must rely on the Fair Trading Act, Contractual Remedies Act 1979 and Sale of Goods Act.
- 68 Submissions from industry indicated that often goods passed in at auction are sold promptly following the auction by the auctioneer to a bidder that attended the auction, essentially as a continuation of the bidding process. It was suggested that the same terms and guarantees should attach to that sale as if the goods had been sold by auction.

Further Analysis

- 69 The rationale for excluding auctions and competitive tenders from the Consumer Guarantees Act in 1993 included:
- a auctions and tenders were at that time thought to be too removed from the consumer context to justify extending the protection of the guarantees to those forms of sale;
 - b an issue was identified that if auctions were to be covered it could result in the auctioneer being responsible for goods sold by private sellers; and
 - c it was thought that arguably there should be some opportunity to continue to sell items on an “as is, where is” basis and auctions and tenders were viewed as legitimate outlets for such sales.

Auctions

- 70 Examining these reasons shows that auctions are no longer removed from the consumer context. Consumers now regularly purchase from both online auctions and traditional (in-person) auctions.
- 71 If the Consumer Guarantees Act applied to auctions then it would be necessary to consider auctioneer liability. This is because the definition of “supplier” in the Consumer Guarantees Act includes “a person who, in trade, is acting as an agent for another, whether or not that other is supplying in trade”. A traditional auctioneer sells goods as the agent of the vendor. However, the “agent” aspect of the supplier definition is unlikely to cause issues for online websites such as Trade Me (where their terms and conditions make plain that they are not acting as an agent for the supplier).
- 72 A “blanket” exemption from the Consumer Guarantees Act should not be justified on the basis of a need to have an “as is, where is” sale outlet. A blanket exemption is too blunt an approach, as a number of the guarantees in the Act do not relate to the quality of the goods.
- 73 In addition to the guarantee of acceptable quality the Consumer Guarantees Act includes guarantees in respect of title, fitness for particular purpose, that goods comply with description, that goods comply with sample, price, repairs and spare parts, and manufacturers’ express guarantees. Issues in respect of these matters can arise in the auction context. For example, the High Court recently granted an injunction to direct Lady Hillary to stop the sale of the collection of Sir Edmund Hillary’s Rolex watches in an auction, following concerns regarding title (and that the watches were owned by the children and not Lady Hillary).
- 74 Appendix 2 provides an assessment of the suitability of each of the guarantees in the Consumer Guarantees Act in an auction context. The analysis in the Appendix considers whether a different approach is required in a “traditional auction” and “online auction” environment and whether the auctioneer would have difficulties giving the guarantee on behalf of the vendor.
- 75 The analysis in Appendix 2 identifies:

- a except for the guarantee of acceptable quality, all of the guarantees should apply to sales to consumers in an auction context (including traditional and online auctions), unless the consumer is notified that the vendor is a private seller that is not in trade;
- b with respect to the guarantee of acceptable quality:
 - i sales of all new goods by traditional or online auction should be subject to the guarantee of acceptable quality;
 - ii sales of secondhand goods by traditional auction should not be subject to the guarantee of acceptable quality, but sales of secondhand goods by online auctions should be subject to the guarantee of acceptable quality;
- c in relation to all auctions (traditional, online or otherwise) sales should not be subject to the Consumer Guarantees Act where the consumer is notified that the vendor is a private seller that is not in trade; and
- d in relation to certain of the guarantees (in particular the guarantee as to title, that the goods comply with description, that the goods comply with sample, and the guarantee as to repairs and spare parts) the actual supplier of the goods is likely to be in a better position than an “auctioneer” to give the relevant guarantee.

76 With respect to the latter point, for auction sales there should be a mechanism for the auctioneer to “pass on” the responsibility for the supplier guarantees to the actual supplier. We recommend that where the auctioneer discloses the supplier’s contact details to the purchaser at, or promptly following, the time of sale, then the “agent” aspect of the supplier definition in the Consumer Guarantees Act should not apply to that auctioneer in relation to that sale.

77 This approach will leave the auctioneer responsible for the giving of the guarantees where a supplier is “in trade” and is undisclosed and for clearly notifying if a sale is by a vendor that is not in trade. Any additional risk this approach places on the auctioneer can be covered off in the auctioneer’s terms and conditions of the sale that they agree with the seller. This approach would be consistent with the proposed registration regime, as it would encourage auctioneers to confirm the identity of the vendors and ensure undisclosed sellers have the ability to sell the items (e.g. encourage against the selling of stolen property).

78 Extending the coverage of the Consumer Guarantees Act as suggested should not significantly increase auctioneer compliance costs, as:

- a A number of auctioneers voluntarily choose to offer warranties similar to many of the guarantees covered by the Consumer Guarantees Act. For example, Turner’s Auctions has advised that they provide a warranty as to title and a warranty there is no outstanding finance on the item being sold. They also provide a warranty regarding the representations made about an item.

- b In terms of the ability of an auctioneer to recover any costs of providing a guarantee from an undisclosed supplier, it appears many auctioneers already include a provision addressing this in their contract with the vendor.
- 79 The Consumer Guarantees Act only applies to suppliers that are “in trade”. It would be useful, especially in the context of online auctions, for consumers to be able to verify who is in trade. Clarification would also be useful for auctioneers in terms of assisting them to classify whether a vendor is a “private seller” or is “in trade”.
- 80 Both the Consumer Guarantees Act and the Fair Trading Act define trade as “any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services” and the Fair Trading Act also includes “or to the disposition or acquisition of any interest in land”. Consistent with the principles-based drafting of the Consumer Guarantees Act and Fair Trading Act, neither of those Acts include a clear description of who is deemed to be “in trade”.
- 81 Where a person is a private seller at a traditional auction, the auctioneer should make it plain to potential purchasers that the applicable guarantees in the Consumer Guarantees Act will not apply to the sale. Where a person is a trader using an internet auction such as Trade Me, the internet auction provider should require that this is disclosed (and thus provide an alert that the Consumer Guarantees Act applies).
- 82 There are some private sellers on Trade Me who have sold hundreds of items. Given this, without an explicit statement, it will be difficult for purchasers to identify private sellers that have sold numerous items from actual traders. Consideration was given to requiring private sellers to identify that they are private sellers and the Consumer Guarantees Act does not apply. It would be very difficult to enforce such a provision, so a reverse requirement to that for traditional auctions is recommended.
- 83 With respect to who is “in trade” section 6 of the Secondhand Dealers and Pawnbrokers Act provides a possible yardstick. That section essentially states that, for the purposes of that Act, a person is presumed (in the absence of evidence to the contrary) to be engaged in business as a secondhand dealer if, in any 12 month period, the person (a) buys secondhand articles for the purpose of trade on 6 or more different days; or (b) sells or otherwise deals in secondhand articles on 6 or more different days or so as to receive revenue of \$2,000 or more from the sale.³
- 84 This definition does not recognise private sales of secondhand goods very well. It would be useful to amend this definition by clarifying that evidence to the contrary may include that the goods were purchased or acquired for personal use and are being sold as they are no longer required.

³ The \$2,000 limit in the Secondhand Dealers and Pawnbrokers Act seems likely to be out of date and too low, and the limit should be reviewed if a similar threshold is to apply for auction sales for “traders”.

- 85 With this amendment, it would mean that although many sellers on online auction websites may have in excess of 6 “trades” they would not be a trader unless they purchase items on 6 or more days for the purpose of resale or have sales on 6 or more different days totalling more than \$2,000 of goods of items which they purchased for the purpose of selling. For example, a mother of a young child may have far more than 6 trades of secondhand baby clothes that her quickly growing child no longer requires, but provided the items were purchased for the child’s personal use (rather than for the purpose of secondhand trade) then the mother would not be required to be licensed as a secondhand dealer and is unlikely to be “in trade” for the purpose of the Consumer Guarantees Act.
- 86 It would be inappropriate to include a “6 or more” type definition of a “person in trade” in either the Consumer Guarantees Act or Fair Trading Act directly. This would be inconsistent with the principles-based drafting of the Act. Also when a trader first sets up their business it would be illogical for the first five transactions to be exempt from the Consumer Guarantees Act or Fair Trading Act.
- 87 Complementing the recommended amendments above, the Ministry of Consumer Affairs website could also include additional information clarifying the application of the Consumer Guarantees Act to online auctions and other auctions.
- 88 As noted in paragraph 68, submitters also noted uncertainty with respect to goods passed in at auction and then subsequently sold to a bidder. We recommend that the auctioneer and purchaser should be able to agree that a sale by the auctioneer of a lot to a bidder that was present at the auction for the sale of that lot within 1 business day of the auction can be deemed to be a sale at auction.

Competitive tenders

- 89 Competitive tenders are not defined in the Consumer Guarantees Act or any other legislation. Damaged goods are sometimes sold by a competitive tender process. These sales are unlikely to contravene the Consumer Guarantees Act provided the goods comply with their description and defects are drawn to the consumer’s attention. There does not appear to be good reason to continue to exclude sales of these goods from the Consumer Guarantees Act.

Recommendations

Recommendations in relation to licensing of auctioneers

- 90 From the above analysis and discussion, the Ministry recommends that the Auctioneers Act 1928 be repealed and a new registration regime implemented as a Schedule to a new Auctions Part of the Fair Trading Act.
- 91 We recommended a registration regime be enacted that is broadly similar to the registration requirements in the Motor Vehicle Sales Act and the licensing requirements in the Secondhand Dealers and Pawnbrokers Act which would:

- a Require each auctioneer to be registered. Provision would also be made for registration in the name of a body corporate auction house and for individual auctioneers to be endorsed on the corporate licence.
- b Require full contact details and other specified information to be submitted in support of the registration application.
- c Prescribe a list of persons disqualified from being registered, which would be similar to sections 24 and 25 of the Motor Vehicle Sales Act and section 22 of the Secondhand Dealers and Pawnbrokers Act (e.g. if convicted of an offence under the Crimes Act, Fair Trading Act or other similar legislation, or if under the age of 18 years or if the person has previously had, or managed a company that has had, an auctioneer licence or registration cancelled or refused in the past 5 years).
 - i allow for police checks to be obtained by the registrar to verify convictions.
 - ii given the potential impact to a person's occupation, include an appeal right to the District Court in relation to any decision not to register.
 - iii specify the process for registration renewal and payments of registration fees.
- d Specify the minimum obligations of registered auctioneers, including:
 - i consistent with the current legislation, a requirement to account for the proceeds of sale within a maximum of 14 days (excluding bank holidays);
 - ii a restriction on misappropriating goods or proceeds, theft or falsifying accounts;
 - iii record keeping obligations, which must be disclosed to the police and other authorities on request;
 - iv to not sell or conduct auctions in a manner contrary to the Fair Trading Act; and
 - v to ensure that members of the public are not unreasonably restricted from attending and participation in an auction held by the registered auctioneer.
- e Specify the auctioneer's requirement to produce copies of registration on request and other similar obligations.
- f Specify offences for a failure to comply with the provisions in the Schedule.

- g Require the registrar to establish and maintain a central register of registered auctioneers and for the public and police to have access to these registers.
- h Appropriately recognise licences issued by other licensing regimes, which will likely require a number of consequential amendments. This will include an expanded equivalent to section 34 of the Auctioneers Act (which makes it an offence to let out, hire, or lend an auctioneers licence to any person; or for someone to trade with another person who has had such a licence let, hired, or lent to them except as authorised), such that it is not an offence for a registered auctioneer to have an arrangement with a person that is licensed under another Act in relation to goods or property that that person is able to auction under that other Act.
- i Exempt certain “auctions” from a requirement to hold an auctioneers licence, including:
 - i retaining the exemptions already provided for under section 44 of the Auctioneers Act (e.g. sales under any Act that authorise a person to conduct a sale by auction without a licence/registration);
 - ii internet auction providers and vendors selling via an internet auction provider that is not performing the services of an auctioneer; and
 - iii fundraising auctions conducted solely for the benefit of a “society” (defined as “an association of persons established and conducted entirely for purposes other than commercial purposes”) where each lot has a market value or estimated sale price of less than \$5,000 and the total auction has a market value or estimated sale price of up to \$25,000.
- j Include an appropriate commencement date or transitional provisions to ensure auctioneers licensed under the current Auctioneers Act are not required to also be registered under the new registration requirements until their current licences expire.
- k Provide for regulations to be made that prescribe registration fees and other process type matters.
- l Include a number of consequential amendments required to update legislation that currently refers to the Auctioneers Act.

92 We recommend the definition of auction is amended along the following lines (as an alternative to the outdated definition currently in the Auctioneers Act):

An auction is the sale of any property including goods, land or services of any kind to the highest bidder. An auction includes any process commonly known and understood to be by way of auction:

- which commences when the person conducting the auction invites a first bid from persons participating in the auction; and
- where bidders may bid in person, via telephone or through the internet or any other means, provided each bidder can participate in real time in the auction being conducted.

93 We recommend the registration process is administered by and the registrar appointed by the Ministry of Economic Development.

Recommendations in relation to conduct of auctions

94 Although section 9 of the Fair Trading Act provides general protection from misleading and deceptive auction practices, given various current industry practices and in the interests of clarity, we recommend the inclusion of an Auctions Part in the Fair Trading Act which clarifies that a number of misleading auction practices would contravene the Fair Trading Act as follows:

- a people attending an auction should not be at risk of misunderstanding whether a bid was made by a genuine bidder or on behalf of the vendor;
- b it would be misleading to make a bid by or on behalf of the vendor in relation to a lot or auction that was advertised as being “no reserve” or in relation to any lot where the bidding for the relevant lot is at or above the reserve price;
- c it would be misleading for post-auction advertising for any goods or property to refer to any bid made by or on behalf of the vendor; and
- d for legislative simplicity, the provisions currently in section 59 of the Sale of Goods Act and section 42 of the Property Law Act should be repealed and enacted in the Fair Trading Act.

Recommendations in relation to auctions and the Consumer Guarantees Act

95 We recommend the blanket exemption for auctions and competitive tenders is removed from section 41 of the Consumer Guarantees Act. This will mean the guarantees in the Consumer Guarantees Act apply to sales by competitive tenders by traders to consumers.

96 We recommend the guarantees in the Consumer Guarantees Act in relation to auctions apply, unless the consumer is notified by the auctioneer or internet auction provider that the vendor is a private seller that is not in trade, as follows:

- a all of the guarantees (except for the guarantee of acceptable quality) should apply to sales to consumers in an auction context (including traditional and online auctions);
- b with respect to the guarantee of acceptable quality:
 - i sales of all new goods by traditional or online auction should be subject to the guarantee of acceptable quality;

- ii sales of secondhand goods by traditional auction should not be subject to the guarantee of acceptable quality, but sales of secondhand goods by online auctions should be subject to the guarantee of acceptable quality.
- 97 In respect of the “agent” aspect of the supplier definition in the Consumer Guarantees Act:
 - a this is unlikely to be problematic for online auction providers, who do not act as agents;
 - b it may be inappropriate for the auctioneer to be responsible in relation to certain of the guarantees as the supplier of the goods is likely to be in a better position than an “auctioneer” to give the relevant guarantee.
- 98 Accordingly, we recommend that for the purpose of auction sales where a registered or licensed auctioneer (whether registered under the proposals above or other legislation and whether holding in-person, online or “hybrid” auctions) discloses the supplier’s contact details to the purchaser at, or promptly following, the time of sale, then the “agent” aspect of the supplier definition in the Consumer Guarantees Act should not apply to that registered auctioneer in relation to that sale.
- 99 We recommend that internet auction providers should require persons listing items to clearly identify if they are “in trade”.
- 100 We recommend where an auction is being conducted by a registered auctioneer. If the items are being auctioned for a private seller, the auctioneer must make it plain to potential purchasers whether the guarantees in the Consumer Guarantees Act will not apply to the sale.
- 101 We recommend that section 6 of the Secondhand Dealers and Pawnbrokers Act is amended to clarify that goods that were purchased or acquired for personal use and are being sold as they are no longer required do not count as trades.
- 102 We recommend that the auctioneer and purchaser should be able to agree that a sale by the auctioneer of a lot to a purchaser that was present at the auction for the sale of that lot within 1 business day of the auction can be deemed to be a sale at auction.
- 103 Actual drafting of any amendments (including to the Fair Trading Act and the Consumer Guarantees Act) is undertaken by the Parliamentary Counsel Office, and thus any suggested phrasing in this paper is indicative only.

Appendix 1: Analysis of auctioneers against MED’s Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations.

| Step One: Identify whether intervention in an occupation is necessary? | |
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| Framework | Analysis of Auctioneers |
| <p>Consider the nature of the risk from the occupation:</p> <ul style="list-style-type: none"> • probability of significant irreversible harm occurring • availability of other means of handling risk (e.g. insurance) <p>If significant irreversible harm is likely there is a case for intervention in the practice of the occupation. Significant harm is significant harm to one person or moderate harm to a large number.</p> <p>Consideration of whether the risk is voluntary or involuntary is also appropriate (e.g. an individual voluntarily assumes the risks associated with activities such as deep sea diving but involuntarily assumes the risks regarding a building’s safety when they enter the building).</p> | <p>Incompetent practice by an auctioneer has the potential to cause harm to vendors and purchasers, including consumers, including:</p> <ul style="list-style-type: none"> • an auctioneer failing to account to the seller for the proceeds of sale • an auctioneer selling stolen goods • an auctioneer failing to carry out their services to the seller with reasonable care and skill (such as inspection and cataloguing of items, arrangement of advertising and marketing) • the manipulation of the auction process by the auctioneer • the auctioneer selling items for much lower prices than could have been obtained • collusion between the bidders, or between the auctioneer and a bidder • auctioneers making false or misleading representations about the property being sold <p>The potential harm is largely financial (as opposed to risks of permanent disability or death which are addressed by other licensing regimes), is likely reversible if identified (e.g. through payment of “damages” or some other remedy) and is largely voluntarily assumed (i.e. the suppliers and purchasers choose to purchase via auction).</p> <p>However, the potential sums of money involved at some auctions mean the harm could be viewed as significant. An auction is theoretically a forum for setting a fair, competitive market price. If subject to manipulation, this discredits this sales forum and discredits its use for such things as fairly disposing of repossessed goods. For a person whose goods have been repossessed, manipulation of the auction to obtain lower prices has a significant individual impact. This risk is involuntary.</p> <p>We are not aware of many examples where significant harm has occurred. However, this may suggest that the current licensing of the industry is effective, rather than that significant harm cannot occur.</p> |

| Step Two: Identify whether intervention by Government is justified? | |
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| Framework | Analysis of Auctioneers |
| <p>Consider whether existing means of protection from harm for consumers and third parties are sufficient (e.g. civil law, consumer legislation).</p> <p>Consider ability of industry to regulate itself.</p> <p>Consider likely effect of intervention by Government.</p> <p>If significant harm is likely, existing means of protection are insufficient, the industry is unable to regulate itself adequately and intervention by Government is likely to improve outcomes, there is a strong case for Government intervention.</p> | <p>As discussed elsewhere in this paper, consumer and other law provides some protection (e.g. the Fair Trading Act helps protect against some inappropriate auction practices and misleading representations) and it is proposed elsewhere in this paper that this protection be extended.</p> <p>However, it is considered the risks of the auctioneer failing to account to the vendor for the profits or of selling stolen goods are not addressed adequately by other legislation.</p> <p>Civil claims (e.g. in contract and agency) technically offer some protection, e.g. a vendor would have a claim against an auctioneer that failed to provide the vendor with the purchase money. However, pursuing such a claim is often costly and problematic.</p> <p>When the Auctioneers Act was originally enacted there was a perceived risk that for livestock sales and other auctions, auctioneers may disappear after the sale day and be difficult to trace. Arguably that risk is less likely now. However, it is clear that if a person wished to use an auction process to defraud, then the auctioneer role could provide an opportunity for this.</p> <p>To ensure auctions do not become a mechanism for selling stolen goods, we consider it is appropriate for auctioneers to confirm the identity of the seller, to keep detailed records and for the police to have access to those records. We understand most auction providers keep such records and take steps to ensure themselves of the seller's identity. We note that these matters were also considered relevant in the licensing of secondhand dealers, pawnbrokers and traders.</p> <p>It is noted that section 69 of the Secondhand Dealers and Pawnbrokers Act requires internet auction providers to record the full name, date of birth, contact telephone number, and email address of every person offering secondhand articles or scrap metal for sale on the internet auction provider's website. Also, most internet auction providers (e.g. Trade Me, eBay etc) do not collect auction money on behalf of the vendor. Accordingly, we consider there is a much lesser case for licensing in relation to sales via an internet auction site.</p> |

We consider that persons that have a record of dishonesty or inappropriate financial history (e.g. convicted of fraud, unable to be a director, undischarged bankrupt etc) are unsuitable for the role of an auctioneer. The current wording in section 12 of the Auctioneers Act is consistent with this (i.e. “the character and financial position of the applicant are such that he is in the opinion of the District Court Judge, having regard to the interests of the public, a fit and proper person to hold such a licence”). However, rather than an opinion based test, we consider it would be clearer for applicants if the Act listed matters which would disqualify the person from being an auctioneer. Such a list may be similar to section 22 of the Secondhand Dealers and Pawnbrokers Act and section 24 of the Motor Vehicle Sales Act (which effectively state that a person is disqualified if he or she is under the age of 18, has been convicted of certain specified offences, has been imprisoned in the last 5 years, has had a licence cancelled within the last 5 years etc).

We note that self-regulation is theoretically possible and has been promoted by the Auctioneers Association. The Association represents approximately a third of auctioneers. However, no other submissions have directly supported self-regulation, including submissions by auctioneers. The responses from auctioneers regarding licensing varied – with one suggesting no form of regulation is required and another suggesting positive licensing is appropriate. Another submitter suggested that regulation should be based on the goods being sold, rather than the mechanism of sale.

Given the range of views in the industry, the broad range of potential goods/property that may be sold at auction, the existence of comparable licensing registration regimes for other sales involving similar risks (e.g. statutory registration licensing regimes for motor vehicle traders, real estate agents, secondhand dealers and pawnbrokers) and the fact that the majority of the industry are not members of the Auctioneers Association, we consider it unlikely that industry self-regulation will be supported by a sufficient quorum of the industry.

Overall, we consider that intervention by Government in respect of traditional auctioneers is appropriate as it is likely to improve outcomes (compared with either a deregulated market or the status quo), and would be consistent with other industries that sell goods or property on behalf of the vendor.

Given the requirements for internet auction providers to keep records of sales and given that they do not typically receive money on behalf of the vendor, we do not consider registration of internet auction providers is justified. Also given the numbers of vendors that list on such

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| | sites and that the vendors receive the funds directly from the purchasers, we do not consider registration of the sellers is justified. |
| Step Three: Identify the most effective form of Government intervention | |
| Framework | Analysis of Auctioneers |
| <p>Consider the nature of the problem posed by the occupation. Would it be solved by:</p> <ul style="list-style-type: none"> • Provision of information to consumers • Training of practitioners • Setting and enforcing standards • Specifying services Government will purchase • Legislation regulating practice of occupation? <p>If only a specific aspect of the practice of an occupation poses a threat to consumers or third parties, the best solution is to target that aspect rather than legislate to regulate the occupation.</p> | <p>The key aspects of the auction relationship which we consider justify intervention are:</p> <ul style="list-style-type: none"> • that persons who have a record of dishonesty, breaches of Part 1 of the Fair Trading Act (which relates to misleading and deceptive conduct, false representations and unfair practices) or inappropriate financial history cannot be auctioneers • that auctioneers account to vendors reasonably promptly for the proceeds of the sale • that auctioneers are required to verify the vendor's identity and keep appropriate records, to mitigate the potential for stolen goods • that the police and any other appropriate authority should be able to have access to such records where appropriate • that there is a central register of auctioneers which the public can access to verify that someone is registered/licensed <p>There are a number of aspects of the auction relationship where no concerns have been raised - for example, no concerns have been raised regarding the terms and conditions of auctioneer's agreements for the provisions of their services or regarding the success margin that they typically receive.</p> <p>While training of auctioneers and providing additional information may be useful, it is unlikely to sufficiently cross the need for intervention. Given this, we consider the best solution is to legislate for the aspects bullet-pointed above.</p> |

| Step Four: If legislation is required to regulate an occupation, what form of regulatory regime is needed? | |
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| Framework | Analysis of Auctioneers |
| <p>Options include:</p> <ul style="list-style-type: none"> • Disclosure • Registration • Certification • Licensing those entering an occupation <p>Licensing workers in an occupation imposes costs and reduces flexibility more than other means of control and should be reserved for occupations where there is a high need for control for safety reasons. Any of the other methods are likely to be adequate control for occupations that do not affect health or safety.</p> | <p>The current licensing process administered through the District Courts is fragmented and sub-optimal. A centralised process is preferred.</p> <p>Licensing of auctioneers is not needed for safety reasons. There is a possibility of significant harm to individuals which could affect financial well-being. There is a possibility of stolen goods being disposed of disadvantaging both the owner and purchaser.</p> <p>Other occupations whose conduct gives rise to similar risks (i.e. who sell goods on behalf of a vendor) are real estate agents and pawnbrokers, these occupations are subject to licensing regimes that include a fit and proper person type test or allow for Police objection on the grounds that an applicant is not a fit and proper person. The existing auctioneers licensing regime has such a test.</p> <p>Used motor vehicle traders are subject to a negative licensing – registration regime. If you meet statutorily defined criteria you may be registered. Certain behaviours mean you are banned from registration (including the District Court considering that the person is not a fit and proper person to participate in the business). Given there have not been problems raised about the outcome of auctioneers’ licensing (i.e. inappropriate persons allowed to conduct auctions) and that the conduct of auctioneers does not affect health and safety positive licensing of auctioneers is not justified.</p> <p>However, it is appropriate to have a reasonable degree of parity between occupations that have a similar potential to cause harm and submissions received indicate widespread support from consumers and the industry for some form of regulation or licensing. Accordingly, a negative–registration licensing regime (similar to that for motor vehicle traders) is preferred.</p> |
| Step Five: What legislative provisions are needed to regulate occupations? | |
| Framework | Analysis of Auctioneers |
| <p>The framework does not specify example provisions.</p> | <p>Discussed in main body of paper.</p> |

Appendix 2: Auctions and the guarantees in the Consumer Guarantees Act

| Guarantee | Should the guarantee apply to auctions? Is a different approach appropriate for traditional auctions and online auctions? |
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| <p>Title (section 5). Provides guarantee that:</p> <ul style="list-style-type: none"> • supplier has right to sell the goods; • the goods are free from any undisclosed security; and • consumer has the right to undisturbed possession of the goods (subject to specified exceptions). | <p>Yes, a consumer should be able to assume that the person that sold the goods had the right to sell the goods.</p> <p>This guarantee should apply to traditional and online auctions (and competitive tenders).</p> <p>The actual supplier of the goods is likely to be in a better position than the “auctioneer” to give a guarantee as to title. Previous case law on this issue indicates that in general auctioneer liability is unlikely when the auctioneer acted in good faith and without knowledge of any adverse claim to the goods. For example, <i>Payne v Elsdon</i> (1900) involved the sale by an auctioneer of goods sold under a distress warrant. The warrant was later found to be invalid and the auctioneer was held not to warrant the validity of the distress warrant.</p> |
| <p>Acceptable quality (section 6). Provides guarantee that the goods are of acceptable quality. Meaning the goods are:</p> <ul style="list-style-type: none"> • fit for all the purposes for which goods of type are commonly supplied; • acceptable in appearance and finish; • free from minor defects; • safe; and • durable, <p>or where defects of the goods have been drawn to the consumer’s attention.</p> | <p>Where secondhand goods are sold at traditional auction, there may be numerous lots of secondhand goods and a limited time for the auctioneer to assess the quality of the goods. Also, often the auctioneer will not be an expert in the goods that are being sold, and it may be impracticable for the auctioneer to assess the quality of the goods.</p> <p>For certain sales, e.g. liquidation sales, estate sales and repossession sales, traditional auctions represent a suitable “disposal” mechanism of the secondhand goods. However, “surplus” stores or stores that go into liquidation (e.g. “closing down” sales) are not exempted from the Consumer Guarantees Act.</p> <p>In the auction context the sales may be for low value items where it may be inefficient for someone to ascertain the quality of each of the goods for sale and whether there are any significant defects which should be drawn to a potential purchaser’s attention. It would not be a good outcome if the application of an acceptable quality guarantee led to unnecessary dumping of secondhand goods.</p> <p>In relation to goods at auction that are advertised as “new” or “still in box” or “in original condition” etc then there is an assumption made by the purchaser that the goods will be of the original quality. In this case, it would be misleading for the goods to be advertised as “new” if they did not meet the acceptable quality guarantee of the original. For such new goods, the guarantee of acceptable quality should apply.</p> |

| Guarantee | Should the guarantee apply to auctions? Is a different approach appropriate for traditional auctions and online auctions? |
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| | <p>In relation to online auctions, a number of traders are selling new goods online, and these should be subject to the same protections as new goods purchased in-store. Submissions highlighted some unfortunate consequences of the lack of Consumer Guarantees Act protection – including a manufacturer that would not honour the guarantee in respect of a new computer purchased online.</p> <p>For secondhand goods sold online, the time and practicality of assessing defects is likely to be less of an issue than is the case for traditional auctions. This is because the seller is more likely to be familiar with the goods and is better able to find the time to examine the goods and include a description of defects with the internet listing.</p> <p>Where someone is “in trade” the same protections should apply whether that person sells in-store or online. For example, sales by secondhand dealers are subject to the Consumer Guarantees Act.</p> <p>One trader stressed the need for an “as is, where is” sale mechanism (for older, secondhand goods). However, we consider that traders may be overstating the extent of the quality guarantee in relation to secondhand goods. In our view, it is implicit that secondhand goods may be at a lower quality than new goods. A separate paper on the acceptable quality guarantee is being prepared that will discuss this issue further. Also (as per rationale above) it should not be necessary for secondhand items sold at a traditional auction to be subject to the acceptable quality guarantee and, if this approach is adopted, this would provide an “as is, where is” sale mechanism.</p> <p>A different issue arises in relation to goods where the supplier is aware of significant defects and tries to conceal these. Deliberate concealment, regardless of whether or not the Consumer Guarantees Act applies, may be misleading or deceptive conduct.</p> |
| <p>Fitness for particular purpose (section 8). Unless consumer does not rely on supplier’s skill/judgment or it is unreasonable for the consumer to rely on the supplier’s skill or judgment:</p> <ul style="list-style-type: none"> • that goods are reasonably fit for | <p>In the traditional auction context it would usually be unreasonable for the consumer to rely on the auctioneer’s judgment in relation to the fitness for purpose of the goods. This is because the auctioneer is unlikely to be an expert in the goods in question. Accordingly, if the guarantee did theoretically apply to sales by auctions, it is likely to have a significant impact.</p> <p>However, where a vendor or the auctioneer did discuss the suitability of a particular good at length with a consumer and the consumer relied on the statements made, it would be appropriate</p> |

| Guarantee | Should the guarantee apply to auctions? Is a different approach appropriate for traditional auctions and online auctions? |
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| <p>purpose consumer makes known; and</p> <ul style="list-style-type: none"> goods are reasonably fit for purpose supplier represents that they are or will be fit. | <p>for this guarantee to apply. In such a case, the auctioneer may be otherwise liable for any false statements, e.g. through the Fair Trading Act.</p> <p>Also, there are occasions where auctioneers sell their own goods (e.g. import goods for sale) and in such scenarios it may be reasonable for the consumer to rely on the auctioneer's judgement.</p> |
| <p>Goods comply with description (section 9).</p> | <p>In terms of the Consumer Guarantees Act, consumers will rely on the descriptions being accurate. An inaccurate description may also contravene other of the auctioneer's obligations (e.g. to the vendor or under the Fair Trading Act). It would be consistent with the auctioneer's and supplier's obligations for the guarantee as to description to apply to both traditional and online auctions.</p> <p>The description of goods in the traditional auction context is important and the auctioneer is often given very particular descriptions of the goods that they are asked to apply to the goods. This is because poor descriptions can influence the sale price. The <i>Auction</i> chapter in <i>Laws of New Zealand</i> notes that unless the contract between the auctioneer and the supplier permits an auctioneer to apply descriptions, the auctioneer must apply any descriptions expressly or impliedly instructed, and if the auctioneer fails to do so, he or she will be liable to the supplier in damages for the difference between the price achieved and that which the property would likely have realised if it had been described as instructed.</p> <p>Given that a traditional auctioneer is obliged to apply the description that they are instructed to use and may not be an expert in the goods that are being sold, it may be more appropriate for the actual supplier (rather than the auctioneer) to be the supplier for the purpose of this guarantee.</p> |
| <p>Goods comply with sample (section 10). Where goods are supplied by reference to a sample or demonstration model, that the goods correspond with the sample and that the consumer will have a reasonable opportunity to compare the goods with the sample.</p> | <p>This guarantee should apply in relation to online auctions and traditional auctions.</p> <p>Where a sample is demonstrated at an auction, the consumer will assume that the sample is representative and that the actual goods correspond with the sample. It is appropriate that this guarantee applies and that there is a reasonable opportunity for the consumer to compare the goods with the sample. This inspection opportunity may often be suitably provided prior to the auction commencing.</p> <p>Given that the auctioneer may not be an expert in the goods that are being sold, it may be problematic for the auctioneer to confirm that all of the goods correspond with the sample. Accordingly, it may be more appropriate for the actual supplier (rather than the auctioneer) to be</p> |

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| | the supplier for the purpose of this guarantee. |
| Guarantee as to price (section 11). | In relation to both traditional auctions and online auctions, the auction process will determine the price and thus it is unlikely a consumer would look to rely on this guarantee. However, given that the application of the guarantee is unlikely to have any practical application, and for the sake of consistency with other sales, it is desirable for the guarantee to apply. |
| Guarantee as to repairs and spare parts (section 12). Where goods are first supplied in New Zealand, guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available. | This should apply to online and traditional auctions. Many of the goods being sold at traditional auctions will not be first supplied in New Zealand. For example, liquidation, antiques, repossession sales etc. In respect of other sales, there may be no manufacturer to give the guarantee (e.g. livestock sales). However, where valuable goods are imported a consumer will assume that there is an ability to have the goods repaired and/or obtain spare parts unless they are advised otherwise. For example, a consumer should be made aware if there is no ability to obtain spare parts for an imported car. Section 42 of the Act states that this guarantee does not occur where reasonable action has been taken to notify the consumer who first acquired the goods that the manufacturer does not undertake that repair facilities and parts will be available for those goods. The auction process can be structured to inform the consumer if no spare parts or repair facilities are available in New Zealand. As the traditional auctioneer may not be aware whether it is the first time the goods are being sold in New Zealand or aware of who the manufacturer is, it may be more appropriate for the actual supplier (rather than the auctioneer) to be the supplier for the purpose of the guarantee. |
| Manufacturers' express guarantees (section 13). | Any applicable manufacturer guarantees should apply to sales by traditional and online auctions. This guarantee only covers express guarantees and often manufacturer guarantees exclude secondhand sales. |