

**CONSULTATION REGULATION IMPACT STATEMENT**

**CHAPTER FOUR**

# **Australian Consumer Law Review: Access to consumer guarantees for goods sold at auctions**

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Consumer Affairs Australia and New Zealand  
2018

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# TABLE OF CONTENTS

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<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>2</b>
Relevant state and territory laws .....	3
<b>THE PROBLEM.....</b>	<b>4</b>
What is the problem? .....	4
How significant is the problem? .....	5
Previous consideration .....	6
<b>POLICY OBJECTIVE.....</b>	<b>7</b>
<b>OPTIONS AND IMPACT ANALYSIS .....</b>	<b>8</b>
Option 1: Status quo .....	8
Option 2: Goods purchased through auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales).....	12
Option 3: Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding), receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales).....	16
Option 4: All goods purchased through auctions will receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales).....	20
<b>FOCUS QUESTIONS.....</b>	<b>24</b>



# EXECUTIVE SUMMARY

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Currently, goods sold through some forms of auctions are exempt from certain consumer guarantees in the Australian Consumer Law (ACL) because, typically, consumers purchasing from traditional auctions have had the ability to inspect goods to identify any defects through an inspection.

Auctions that occur in an “online only” manner often do not provide consumers with the ability to inspect goods prior to purchase. However, the traditional rationale for the exemptions is difficult to apply to the online context where consumers usually do not have the opportunity to inspect goods prior to purchase.

The Australian Consumer Law Review (the Review) proposed modernising the ‘sale by auction’ exemption to ensure that the consumer guarantees apply regardless of whether the goods are being sold through an online auction. This chapter canvasses options regarding the appropriateness of the exemptions from certain consumer guarantees for online auctions and whether the remainder of the guarantees should apply.

Views are sought on these options – including whether they would address the problem, how effective they would be and what impacts they would have on consumers and businesses. Views on any alternative options regarding the exemptions auctions have from the consumer guarantees are also welcome.

# INTRODUCTION

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1. An auction in the ACL covers situations where goods are sold through an auction that is conducted by an agent of a person. This definition covers ‘traditional auctions’<sup>1</sup> where an auctioneer is in a room taking bids on an item and some online auctions where the website operator is acting as an agent for the seller. Many online auction sites, such as EBay, do not fall within the ACL’s definition of auction as the website in that instance is not acting as an agent.
2. Currently, purchases made at auctions (in the scope of trade or commerce) are sold subject to some, but not all of, the consumer guarantees. The consumer guarantees set out certain standards for goods and services that apply automatically, and provide consumers with a basis for seeking redress where suppliers fail to comply with the guarantees. The guarantees apply automatically and cannot be excluded, modified or restricted by any contractual terms.
3. The guarantees that currently apply to auctions are those that ensure that the person selling the goods has the right to sell those goods. They have been considered critical for goods purchased at auction as a physical inspection of the goods would not reveal the existence of undeclared securities, uninterrupted title or undisturbed possession (sections 51, 52 and 53).<sup>2</sup> The application of these guarantees to purchases made at auction means consumers can make purchases at auction confidently, knowing that there will not be a subsequent attempt to reclaim the goods by another person.
4. Goods purchased at auction are currently exempted from the following guarantees on the basis that consumers should be able to inspect goods prior to the auction:
  - **Section 54** – Guarantee as to acceptable quality
    - Goods supplied must be of acceptable quality, that is, fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe, and durable.
  - **Section 55** – Guarantee as to fitness for any disclosed purpose
    - Goods must be fit to be used for any particular purpose disclosed by the consumer to the supplier, where the consumer relies on, or it is reasonable for a consumer to rely on, the skill or judgement of the supplier.

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1 Throughout this RIS chapter ‘traditional auction’ will be used to define an auction that occurs in a face-to-face manner by an agent.

2 Australian Consumer Law, section 51: Guarantee as to title, section 52: Guarantee as to undisturbed possession, section 53: Guarantee as to undisclosed securities.

- **Section 56** – Guarantee relating to the supply of goods by description
    - Goods must match any description of a good made by the supplier prior to the supply.
  - **Section 57** – Guarantee relating to the supply of goods by sample or demonstration model
    - Where goods are sold by reference to a sample or demonstration model, the goods must correspond to that sample or demonstration model.
  - **Section 58** – Guarantee as to repairs and spare parts
    - Spare parts and repair facilities for goods must be available for a reasonable period of time after the supply of the good.
  - **Section 59** – Guarantee as to express warranties
    - Suppliers and manufacturers must comply with any express warranties made when they sell goods to consumers.
5. When there is a failure to meet the guarantees for a good sold by auction, any action to right the failure will need to be pursued against the person who provided the good for auction. Generally, this will be the business putting their good up for auction through the auction house.

## FOCUS QUESTIONS

### For businesses

- Are you aware that you have obligations under the consumer guarantee framework when selling goods through auction and do you have mechanisms in place to inform consumers of these rights?

### For consumers

- Are you aware that you have some consumer guarantee rights when purchasing at an auction?

## RELEVANT STATE AND TERRITORY LAWS

6. In addition to the ACL, auctions and auctioneers are regulated by various state and territory laws. The various laws prescribe the conditions under which auctions can be held and the licencing of auctioneers. Many auctioneering laws require that an auctioneer must not knowingly misrepresent their description of the goods being sold.
7. In addition, state and territory regulations may prescribe additional requirements. For example, *The Motor Dealers and Chattel Auctioneers Act 2014* (Qld) also provides consumers with an additional statutory warranty in relation to motor vehicles, including those sold at auction, in certain circumstances.

# THE PROBLEM

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## SUMMARY

Goods sold, in trade or commerce, by auction are currently exempt from the majority of consumer guarantees. The Review reached the conclusion that the “sale by auction exemptions” should be modernised to take account of the increasing number of online auctions which do not allow for prior inspection of goods.

## WHAT IS THE PROBLEM?

8. Auctions are a popular way for consumers to purchase goods and for businesses to dispose of goods cheaply and efficiently. Auctions fulfil an important role in the economy by allowing businesses to dispose of goods quickly and without ongoing liabilities. This low cost mechanism is particularly important for businesses in receivership or seeking to dispose of goods at the end of their saleable life.
9. Traditionally, consumers purchasing at auctions would inspect goods prior to the sale so they could make an assessment of the condition of the good.
10. Businesses are not under an obligation to disclose the quality of goods sold at auction and without an inspection it may be difficult for a consumer to determine the various qualities of the good being auctioned.
11. Consumers purchasing goods without the option to inspect are at a significant disadvantage. Over recent years the use of online auctions has increased. For many goods sold through an online auction it is impossible for a consumer to examine and determine the condition of the goods.
12. For auctions occurring in an “online only” manner the sole source of information available to the consumer is the representations made by the seller regarding the quality and nature of the goods. The incidence of consumers being able to bid in a traditional auction online or via the telephone has also increased and may present the same issues with the lack of ability to inspect.

## FOCUS QUESTIONS

### For consumers

- Have you ever purchased a good from an auction without inspecting the good? If yes, how often, why were you unable to inspect and was a detailed condition report made available?

## HOW SIGNIFICANT IS THE PROBLEM?

13. There has been significant growth in the online auction marketplace since the early 2000s. The emergence of online auctions has expanded the number of consumers who purchase goods through auctions. Traditional auction services that offer online sales are also increasingly common in the marketplace. It is unclear how rapidly these services are expanding and the market penetration of online auctions. However, information from online auctioneers, while not comprehensive, provides some indication of the scope of online auctioneering with turnover at major auction services, offering online auctions, estimated at between \$608<sup>3</sup> million to \$2.2 billion per year.<sup>4</sup> It is unclear what proportion of these sales is online only and what proportion is readily available for pre-inspection.
14. Importantly the problem only relates to sites which fall inside the definition of an auction in the ACL. Websites like Ebay and Gumtree are not considered to be auctions under the ACL for reason that both offer a platform for sellers to sell goods, but do not act as agent of the seller. In those circumstances, the full range of consumer guarantees are available on items purchased from businesses sellers.<sup>5</sup> However, a website like Gray's Online in certain circumstances may be acting as an agent for the seller and in those circumstances, the full range of consumer guarantees will not apply to goods sold by businesses.
15. The ACL Review was not able to identify the level of consumer detriment stemming from the current operation of the exemptions from the consumer guarantees for auctions. However, it recognised the principle that consumers may incur detriment from purchasing in an online auction, where consumers could not rely on the ACL to obtain a remedy for a faulty product, and the difficulty this may cause when consumers do not have an ability to inspect the goods.
16. It is unclear how many goods are being sold that are not fit for purpose and do not have faults disclosed in online auctions. The detriment that arises is from when a consumer is unable to seek a remedy in the event of a product failure after purchasing the article at auction. With the rise of many "online only" auctions where many near new or new products are potentially sold, consumers' expectations for product performance may be higher. In these circumstances where a consumer's expectation is higher, that consumer may experience detriment if a remedy is unavailable in the event of a product failure.

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3 <http://www.graysonline.com/aboutus/>.

4 <https://www.pickles.com.au/about>.

5 However, where purchases are not from sellers in trade or commerce, no consumer guarantees will be available.

## PREVIOUS CONSIDERATION

17. The rapid emergence of “online only” auctions was not accounted for during the development of the ACL. In 2009, when the Commonwealth Consumer Affairs Advisory Council (CCAAC) conducted its review into statutory implied conditions and warranties, they considered that the exemptions for auctions were appropriate and should apply to both online and traditional auctions.<sup>6</sup> The review, however, noted that most auction websites operate differently to traditional auctions and the report typically discussed sites such as eBay, which are not considered to be auctions under the ACL. In determining that the existing exemptions were appropriate for online auctions, the report had not envisaged the increase in “online only” auctions that met the definition of an auction in the ACL.
18. The report affirmed that the ability to physically inspect goods is an important feature of traditional auctions and the ability for consumers to inspect goods was the reason that auctions should continue to receive certain exemptions. The report’s assessment of the appropriateness of the existing exemptions from the majority of consumer guarantees no longer captures the range of auctions and auction models that occur in the marketplace.

### FOCUS QUESTIONS

#### For consumers

- What steps do you take to make an informed bid when considering an article at auction if you do not have a reasonable opportunity to inspect the goods?

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6 Commonwealth Consumer Affairs Advisory Committee, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, 2009, page 124.

## POLICY OBJECTIVE

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19. The policy objective is to ensure that exemptions from the consumer guarantees framework in the ACL are facilitating the effective operation of the auction market by balancing the needs of businesses to efficiently dispose of a variety of goods and the needs of consumers to have confidence when purchasing those goods.
20. The options proposed seek to improve the operation of the market for consumers who are purchasing through online auctions by ensuring that where they have no ability to inspect goods they will be able to have easy access to remedies in the event something goes wrong.

# OPTIONS AND IMPACT ANALYSIS

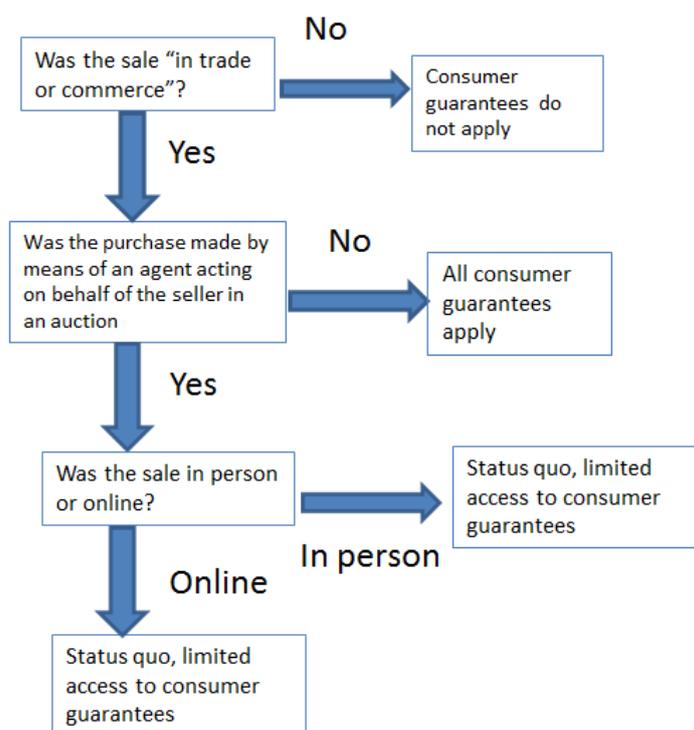
## SUMMARY

The consumer guarantees provisions currently exempt goods sold by auction from a number of consumer guarantees. These exemptions may not be appropriate for goods sold through online auctions, as a person is unable to view the goods in order to form a view as to the quality and attributes of goods.

To address the problem, four options are proposed:

- **Option 1:** Status quo.
- **Option 2:** Goods purchased through online auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales). The status quo remains if the auctioneer makes the goods reasonably available for inspection.
- **Option 3:** Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding) receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). The status quo will remain for consumers who purchase from auctions in person.
- **Option 4:** All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).

## OPTION 1: STATUS QUO



21. In this option consumers that purchase from online auctions will be treated in the same way as those that purchase in person from traditional auctions. That is, they will have consumer guarantee rights that address title, undisturbed possession and undisclosed securities, but not the general guarantees going to quality or fitness of the actual goods. This will not overcome the difficulty of being able to physically inspect goods prior to purchase in all instances, particularly for online auctions.
22. Consumers will continue to place value and rely on information provided by sellers. However, while suppliers are prohibited from making false or misleading representations and may be penalised for doing so, individual consumers will not have direct rights to remedies (such as a repair, refund or replacement) under the consumer guarantees.
23. Sellers in the online auction marketplace may continue to develop alternative approaches to resolving disputes between sellers and customers. For example current approaches include:
  - The auctioneer taking direct responsibility for disputes that arise in relation to the goods sold. The auctioneer's terms and conditions state that they will bear the seller's obligations, provide support and handle disputes about the goods through their own complaints processes. The auctioneer makes the decision whether or not to provide a remedy under the auctioneer's return policy.
  - The auctioneer leaves all disputes to be settled between the buyer and the seller. The auctioneer's terms and conditions seek agreement from the buyer to release the auctioneer from any claim, action, tribunal or court proceedings in respect of an item they purchased through auction. While it is not possible for existing consumer guarantee rights to be written away by a contract, where such rights validly apply, those rights remain the responsibility of the seller and not the auctioneer. Under this model the auctioneer acts solely to facilitate the sale of goods.
24. As the online auctioneering marketplace develops further, businesses may increasingly adopt best practice models to facilitate the sale and purchase of goods. By adopting best practice and facilitating consumers seeking redress when goods are faulty, auction services could facilitate more confident participation in the market.

## Impact Analysis

25. Under the status quo, the law would remain as it is, with the existing framework of exemptions from the consumer guarantees for all goods sold at auction. Consumers bidding online without an inspection of goods would continue to determine their bidding strategy with less information than consumers who are able to inspect goods.
26. The status quo continues to offer consumers access to a wide range of products, ranging from goods sold for parts through to brand new stock. While consumers purchasing at auctions do not have access to the majority of the consumer guarantees this is balanced by possibly lower prices.

27. In maintaining the current exemptions from the consumer guarantees framework the status quo allows businesses to continue to have a low cost mechanism to dispose of goods. This will provide businesses with a means to dispose of goods that can be at the end of their saleable life without the ongoing liabilities from the consumer guarantees regime. This ensures that businesses will be able to recoup some benefits from goods where they would not otherwise be able to.
28. Auctioneers will continue to be able to sell the range of new and used goods that they currently do. The possibility exists that traders may provide more information to prospective buyers regarding the condition of their goods to bring about higher bids.
29. Further, auctioneering facilities will be able to compete with each other on the basis of the services that they provide to sellers and consumers. Some online auctioneers may continue to develop alternative ways in which to help resolve disputes between buyers and sellers. This has already occurred with some of the “online only” auction facilities offering dispute resolution services to consumers.
30. The auction market will continue to grow and auctioneers would expect no change to the value of commissions received from individual goods.
31. Most auctions in the Australian marketplace are likely to offer some form of inspection. Consumers are able to inspect in person or have a friend, relative or profession inspect goods on their behalf. If a consumer, seeking to purchase a good at auction, wishes to increase their knowledge about a good the status quo does maintain costs in time and labour to provide additional information. If they do not choose to inspect the good the lack of information available to consumers is likely to factor into the development of their bidding strategy. Where an inspection is not feasible a consumer purchasing goods through an auction will continue to face higher levels of information asymmetry.

BENEFITS	COSTS
<ul style="list-style-type: none"> <li>• Sellers and auctioneers could continue to undertake voluntary measures to improve the level of information provided to consumers.</li> </ul>	<ul style="list-style-type: none"> <li>• Consumers would continue to not have automatic remedies for defective or unfit goods purchased through auctions.</li> </ul>
<ul style="list-style-type: none"> <li>• Consumers continue to have access to a wide range of goods at auctions and the possibility of purchasing like for like goods at lower prices than that supplied by traditional retailers.</li> </ul>	<ul style="list-style-type: none"> <li>• Consumer confidence for goods purchased at all auctions is unlikely to increase.</li> </ul>
<ul style="list-style-type: none"> <li>• Businesses continue to be able to access a low cost mechanism to dispose of goods.</li> </ul>	<ul style="list-style-type: none"> <li>• Consumers will continue to have search costs if they wish to identify the attributes of a product in developing their bidding strategy.</li> </ul>
<ul style="list-style-type: none"> <li>• Auctioneers will continue to have access to a wide range of products to sell.</li> </ul>	
<ul style="list-style-type: none"> <li>• Auctioneers will continue to compete for both buyers and sellers through offering support to consumers in the event of a product failure.</li> </ul>	

**FOCUS QUESTIONS****For consumers**

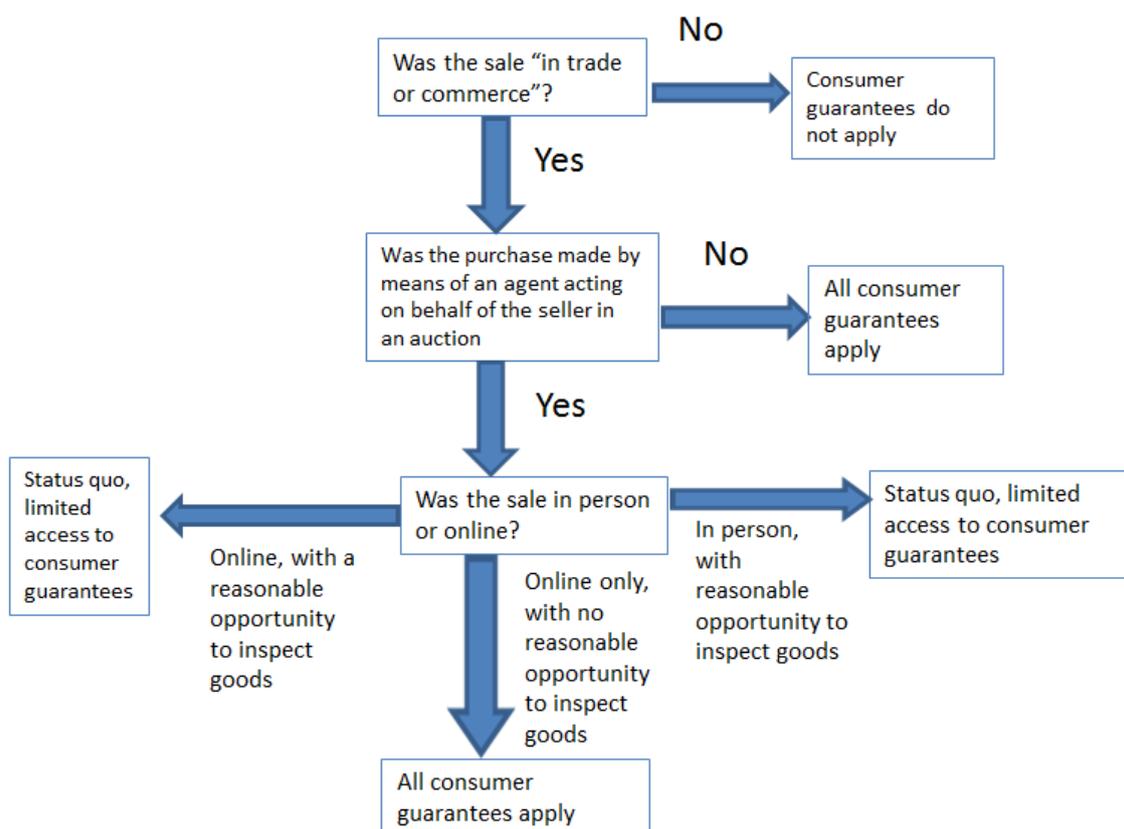
- Do you physically inspect goods before you place a bid? How does it influence your bidding strategy? Do you bid in person or remotely and why?
- Where you have been unable to inspect goods in person, have you ever sought to have someone inspect on your behalf?
- Are you confident placing a bid in an online auction where there is not a reasonable opportunity to inspect the good, if the good has a comprehensive description? Were there opportunities available to seek further details about goods for sale?
- Have you ever purchased a good that did not meet your expectations through an auction? If so how was the problem remedied, and by who?
- Do you have an expectation when purchasing goods from auctions that the seller will assist in the event of a product failure?
- What classes of goods do you purchase at auction (used, new, or refurbished)?

**For businesses**

- How many goods are sold through your auction house each year? How many of these are: sold only in person; sold only online; or sold in person but with online bidding allowed?
- What is the average value of goods sold through your auction house/platform?
- How many bidders on average are there for each good sold? Does this vary significantly for online as opposed to in person auctions?
- What initiatives is your business taking to increase the confidence of consumers purchasing online, and provide redress when things go wrong?

**OPTION 2: GOODS PURCHASED THROUGH AUCTIONS THAT ARE CONDUCTED ENTIRELY ONLINE, WITH NO REASONABLE OPPORTUNITY TO INSPECT GOODS, RECEIVE ACCESS TO THE REMAINDER OF THE CONSUMER GUARANTEES (THAT ARE AVAILABLE IN THE ACL FOR GENERIC RETAIL SALES).**

**The status quo remains if the auctioneer makes the goods reasonably available for inspection**



32. Under this model, only purely online auctions that do not allow a person a reasonable opportunity to inspect the goods will have the remaining consumer guarantee rights applied. This follows from the rationale behind the current exemptions that additional consumer guarantees are not necessary when consumers can inspect the goods at auction.
33. A consumer would not receive the remainder of the consumer guarantees if they participated in an auction where there was a reasonable opportunity to inspect goods. This includes both auctions where:
  - a ‘traditional auction’ operates an online portal for remote bidding, and
  - a website offers auction services with a facility for consumers to inspect goods.
34. Both of these examples allow consumers a reasonable opportunity to view the goods before determining their bidding strategy.

35. A reasonable opportunity for inspection could encompass the approach taken in ‘traditional auctions’ towards the inspection of goods, where goods are available for inspection in a specified place at a specified time. In general, the ACL does not define what ‘reasonable’ is taken to mean and leaves the definition of reasonableness to a court to decide within the context of a given case. This RIS is specifically looking for views on what would constitute a reasonable opportunity to inspect.
36. For “online only” auctions it is proposed that consumers have access to the remainder of the consumer guarantees that are noted in paragraph 4 relating to the quality of goods.
37. The consumer guarantees were designed for consumers purchasing through traditional retail sale mediums. Accordingly, input is sought on what impacts may arise if the full range of consumer guarantees are made available to consumers purchasing through online only auctions where the consumer has not had a reasonable opportunity to inspect the goods.
38. Access to the additional consumer guarantees for goods purchased through “online only” auctions may improve the confidence of consumers purchasing goods through these auctions.
39. Businesses selling goods via auction will continue to have access to an important low cost mechanism for the disposal of goods, while being able to recover costs. Businesses selling through online auctions will have an increase in ongoing liabilities in relation to the possible application of consumer guarantees.
40. Businesses selling goods through auctions need to determine the appropriate auction facility to dispose of their goods. Auction facilities should clearly disclose to the sellers of goods whether they are offering an online only sale or if they have facilities to allow for a reasonable inspection. Auctioneers’ responsibilities will not change in relation to the consumer guarantees as it is the seller of the goods who is responsible for providing a remedy in the event something goes wrong. Auctioneers must not mislead or deceive a consumer in relation to the availability of a consumer guarantee or the goods for sale.

## Impact Analysis

41. Compliance costs under Option 2 are expected to be relatively low as this option only affects a limited number of auctions, noting that there is uncertainty as to what proportion of auctions offer inspections. This option does not provide access to the consumer guarantees where there is a reasonable opportunity to inspect the goods. As such, there will only be an increase in costs to businesses that sell goods sold through “online only” auctions.
42. Consumers who purchase goods from “online only” auctions will likely have increased confidence to purchase goods knowing that in the event of an undisclosed product failure they will have access to consumer guarantees. This increased confidence could translate into consumers developing more aggressive biddings strategies.

43. Where the auctioneering facility provides a reasonable opportunity to view goods, consumers are still able purchase the good without a physical inspection. As is currently the case, consumers who cannot physically inspect goods have alternatives to gain information about a product apart from the seller's representations. Consumers may have a friend, family member, or professional inspect the goods on their behalf and provide them with additional information. Alternatively, the consumer may factor this information asymmetry into their bidding strategy. This is currently the case and imposes no additional search costs on consumers above the status quo for purchases at 'traditional auctions'.
44. As Option 2 does not alter the access to consumer guarantees for auctioneering facilities that offer "online auctions" and "traditional auctions" for the same auction it is unlikely to result in a reduction in the number of auctioneering facilities or goods sold at auction. This will ensure consumers continue to be able to purchase goods at low prices from a wide range of auctioneering facilities. This option also ensures that there is a wide range of auctioneering facilities available to have a low cost method of disposing of goods.
45. For regional auctioneering facilities, who offer both "online" and "traditional auctions" for the same auction, this approach ensures that they will be able to continue to have access to a wide range of consumers through their online bidding platforms to encourage competitive bidding on goods.
46. Where a business sells through an "online only" auction house they will need to be aware that they must comply with the full consumer guarantees regime. This will add training costs to staff to ensure that they are aware of this requirement.
47. Businesses that sell through "online only" auctions, may be incentivised to provide better information to prospective purchasers as to the condition of articles for sale under Option 2. Certain consumer guarantees, such as the guarantee relating to spare parts, do not apply if the seller takes reasonable steps to ensure the consumer is aware that repair facilities and spare parts will not be available. Additionally, the guarantee as to acceptable quality takes into account the price, relevant circumstances and any statements made about a good. For example, when a consumer purchases a crate of dinner plates at an auction for \$5 described as being in 'mixed condition' they would not be able to claim there was a failure entitling them to a remedy if many of the plates in the crate were damaged or broken.
48. Accordingly, it is possible that businesses will incur higher costs in providing greater information about the products they sell in "online only" auctions with a view to minimising their consumer guarantee liability.
49. "Online only" auction facilities will be required to update their terms and conditions, develop processes to connect buyers and sellers in the event of product failures and train staff as to their responsibilities under the consumer guarantees regime. This RIS seeks information on the potential costs that would come from implementing these changes to auctioneering facilities.

BENEFITS	COSTS
<ul style="list-style-type: none"> <li>Consumers would be able to purchase goods through online auctions with increased confidence as they will be able to rely on consumer guarantees.</li> </ul>	<ul style="list-style-type: none"> <li>“Online only” auctioneering facilities may need to develop mechanisms to assist consumers to contact sellers in the event of a product failure.</li> </ul>
<ul style="list-style-type: none"> <li>Sellers may provide better information to prospective purchasers as to the condition of articles.</li> </ul>	<ul style="list-style-type: none"> <li>Sellers using “online only” auctions are likely to incur additional costs if they provide better information to consumers as to the condition of articles.</li> </ul>
<ul style="list-style-type: none"> <li>Consumers may be willing to bid more aggressively on goods due to increased confidence.</li> </ul>	<ul style="list-style-type: none"> <li>There will be training costs to auctioneering facilities as well as for sellers using auctions to be aware of the new requirements for “online only” auctions.</li> </ul>
<ul style="list-style-type: none"> <li>Sellers will continue to be able to access local auction facilities (especially in regional areas) that offer online bidding, maintaining their access to the widest pool of consumers.</li> </ul>	<ul style="list-style-type: none"> <li>“Online only” auctioneering facilities will have to upgrade their website’s terms and conditions.</li> </ul>
	<ul style="list-style-type: none"> <li>Businesses that sell through “online only” auctions will need to comply with additional consumer guarantees.</li> </ul>

## FOCUS QUESTIONS

### For consumers

- Have you bid through an online portal at a traditional auction? How frequently and on what types of good?
- When purchasing online, without inspecting a good, to what extent does the lack of inspection affect your bidding strategy?
- To what extent are you likely to bid more aggressively when you have access to greater information about the product?
- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?
- What would you consider to be a reasonable opportunity for inspection?

### For businesses

- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- What costs do you see associated with the provision of information regarding the quality of goods?
- Do you offer an online portal in conjunction to your ‘traditional auction’, and what percentage of your sales go through this mechanism?
- Do you offer the opportunity to inspect goods? If so, for how long are goods generally offered for inspection?

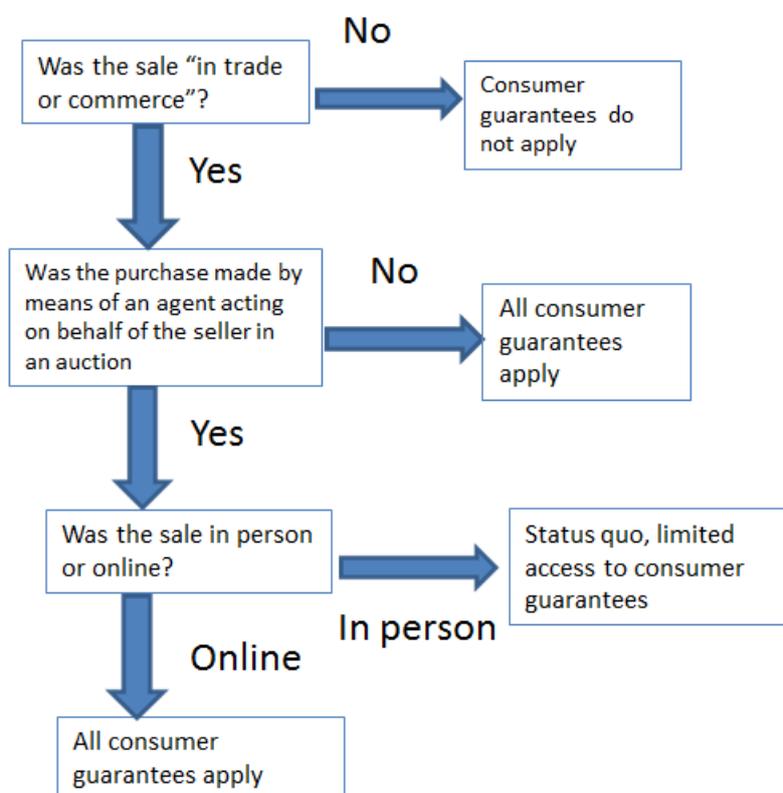
## FOCUS QUESTIONS (CONTINUED)

### For businesses

- What do you consider a reasonable opportunity for inspection would involve?
- Do you consider that any of the consumer guarantees are inappropriate for goods sold through “online only” auctions, and which guarantees and why?
- Would you look to provide a reasonable opportunity to inspect with a view to reducing the scope of your consumer guarantee liability?
- What costs would you face in updating your website’s terms and conditions to adjust to the new regime?
- To what extent are your staff already aware of their responsibilities in relation to consumer guarantees? What costs would be associated with training staff, were the exemptions framework to change as outlined in this option?

**OPTION 3: GOODS PURCHASED THROUGH ONLINE AUCTIONS, REGARDLESS OF THE ABILITY FOR A PRIOR INSPECTION (INCLUDING TRADITIONAL AUCTIONS THAT ALLOW ONLINE BIDDING), RECEIVE ACCESS TO THE REMAINDER OF THE CONSUMER GUARANTEES (THAT ARE AVAILABLE IN THE ACL FOR GENERIC RETAIL SALES).**

**The status quo will remain for consumers who purchase from auctions in person.**



50. In this option, when a consumer purchases a good from an online auction (including from traditional auctions in which online bidding is available), in trade or commerce, they will be entitled to the full range of consumer guarantees even if an inspection is possible. This option creates a simple regime for consumers who may be purchasing through online auctions. However, consumers who purchase from auctions in person will not receive access to the remainder of consumer guarantees.

**For online auctions it is proposed that consumers have access to the remainder of the consumer guarantees outlined at paragraph four.**

51. Similar to Option 2, your input is sought on what impacts may arise if the full range of consumer guarantees are made available to consumers purchasing through online auctions.
52. Option 3 addresses the issue of exemptions from the majority of consumer guarantees for online auctions where it is not possible to inspect goods. This option will allow consumers to confidently bid in online auctions in locations where they are unable to access a viewing – for example, bidding from their home in Perth on an item being sold through the online portal for an auction occurring in Brisbane.

## Impact Analysis

53. Compliance costs under option three are expected to be higher than option two as this option affects all auctions that offer an online ability to bid on goods. This option provides access to the consumer guarantees even where there is a reasonable opportunity to view goods, and applies to all goods sold through any online auction platform in trade or commerce.
54. Consumers will be able to make confident purchasing decisions. This confidence may result in consumers developing more aggressive bidding strategies. Sellers of goods through any online auction could experience higher returns on goods and auctioneers may receive higher commissions on those sales. This RIS chapter is seeking evidence on the likelihood that consumers would be willing to pay more for goods sold at auction if they were confident that they would receive access to the consumer guarantees in the event that something goes wrong.
55. It is possible that businesses that sell through online auctions, where the full range of the ACL consumer guarantees apply, will be incentivised to provide better information to prospective purchasers as to the condition of articles for sale. As noted previously in relation to Option 2, this situation may arise as businesses seek to minimise consumer guarantee liability.
56. It is also possible that businesses may seek to avoid selling goods through auction sites that offer any online bidding facilities to maintain their current level of consumer guarantee liabilities to those associated with their right to sell the good.
57. As a consumer would be able to access the full range of guarantees if they bid through an online portal, consumers are likely to seek online purchasing channels over attending traditional auctions, even when they have physically inspected goods. In this event, it is unclear whether sellers would prefer online auctions, which may obtain a greater pool of bidders albeit with the potential for new consumer guarantee liability, or traditional auctions, where their goods may be bid on by a smaller audience generally with less risk of consumer guarantee claims.

58. If business sellers seek to avoid auction facilities with online portals, there may be a significant reduction in the number of goods available through online facilities. This reduction could occur in two ways. The first is that sellers may avoid auction facilities with online portals; and the second is where auction facilities withdraw their online bidding platforms due to reduced demand.
59. There may be significant regional impacts on auctioneering businesses if businesses seek to avoid selling articles through online auctions. At present many auction houses in remote areas are likely to operate an online portal to facilitate bidding in addition to their traditional auctioneering. If sellers become unwilling to sell through these mediums, rather than being incentivised to provide additional information as to the condition of goods, these auction houses may experience a drop in commissions. Sellers may also experience diminished returns through these regional auction houses (where no online portal is subsequently used) as there would be less competition for goods with the pool of consumers being smaller than an online portal allows.
60. Auction houses will be required to update their disclaimer documents and provide training to staff to assist consumers in the event of a product failure. Auctioneers at present are generally not required to assist consumers dealing with sellers of goods and would need mechanisms to assist consumers. There will be additional training requirements for businesses seeking to dispose of goods via auction.

BENEFITS	COSTS
<ul style="list-style-type: none"> <li>• Consumers can purchase goods through online auctions with increased confidence that they will be able to rely on a relevant consumer guarantee.</li> <li>• It will be easier for consumers to know and understand the consumer guarantee regime and when it applies to auctions.</li> </ul>	<ul style="list-style-type: none"> <li>• All auctioneering facilities offering online portals and sellers of goods through auctions would face staff training costs regarding the new regime.</li> <li>• Businesses may seek to avoid their goods being sold through online auctions, decreasing consumer choice and possibly resulting in lower returns for businesses.</li> </ul>
<ul style="list-style-type: none"> <li>• Sellers and auctioneers may benefit as consumers could be willing to bid more aggressively on goods.</li> </ul>	<ul style="list-style-type: none"> <li>• There could be a reduction in the willingness of businesses to sell through online auctions due to the possibility of additional liabilities.                             <ul style="list-style-type: none"> <li>- Businesses may face higher costs to dispose of goods.</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• Sellers may provide better information to prospective purchasers as to the condition of articles</li> </ul>	<ul style="list-style-type: none"> <li>• Sellers using “online only” auctions are likely to incur additional costs if they provide better information to consumers as to the condition of articles.</li> <li>• Possible business impact on regional auction houses if online auctions are not favoured by sellers.</li> </ul>
	<ul style="list-style-type: none"> <li>• Costs to sellers from the possibility of being liable for a broader range of consumer guarantees.</li> </ul>

**BENEFITS****COSTS**

- All auctioneering facilities offering online portals may need to develop mechanisms to link consumers with sellers in the event of a product failure.
- Consumer confusion around the application of the guarantees would remain when purchasing at a traditional auction.
- Auctioneering facilities would need to amend their terms and conditions.

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**FOCUS QUESTIONS****For consumers**

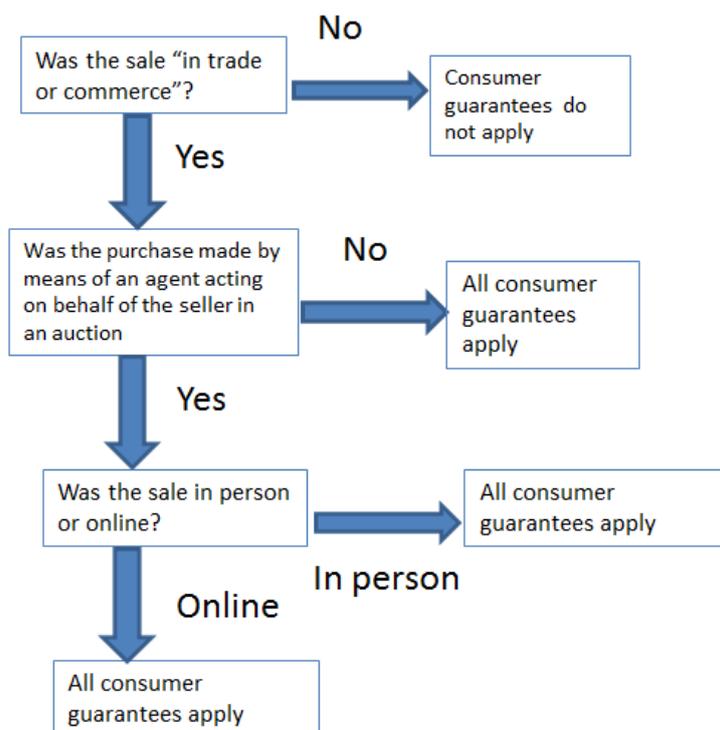
- If the same good was being auctioned in person and online, would you still attend the auction in person?
- If you rarely, or do not bid, at online auctions now, would you be more willing to consider bidding if the goods came with the full range of consumer guarantees?
- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?

**For businesses**

- Do you offer an online portal in conjunction to your 'traditional auction'? If so, what percentage of your sales goes through this mechanism?
- For regional auctioneers, what percentage of your sales comes from bidders in different locations to the 'traditional auction'?
- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- What costs do you see associated with the provision of information regarding the quality of goods?
- If all online auctions received access to all consumer guarantees, would you be less willing to auction your goods through an online portal or by a business that offers an online portal?
- What costs would you face in updating your website's terms and conditions to adjust to the new regime?
- To what extent are your staff already aware of their responsibilities in relation to consumer guarantees? What costs would be associated with training staff, were the exemptions framework to change as outlined in this option?

## OPTION 4: ALL GOODS PURCHASED THROUGH AUCTIONS WILL RECEIVE ACCESS TO THE REMAINDER OF THE CONSUMER GUARANTEES (THAT ARE AVAILABLE IN THE ACL FOR GENERIC RETAIL SALES).

**This option removes all the exemptions in relation to consumer guarantees for goods bought via an auction, no matter the medium of the auction.**



61. This option addresses the issue by removing all consumer guarantee exemptions for goods bought through auctions. It would also result in consumers having the same level of consumer guarantee protection when they buy from a business regardless of whether the good was purchased at auction, a traditional retail store or an online trading store.
62. This option will increase consumer protection by ensuring that all goods purchased at auctions in trade or commerce come with access to all consumer guarantees. It will also remove confusion for consumers, auctioneers and businesses by clarifying and simplifying the rights that apply. For example, parties would not need to identify whether or not a sale is by auction (which can be unclear, for example, when some websites offer online auctions combined with 'buy now' options), and then identify whether the auctioneer is acting on behalf of the seller or it is merely an intermediary platform.
63. Further, while the traditional rationale applies in theory to physical auctions, it is not always clear that consumers do, in practice, have a reasonable opportunity to inspect the goods beforehand. This can be due, for example, to limited time to inspect the goods, restrictions on handling the goods, or the number of attendees at a physical auction.

64. Some overseas jurisdictions have already removed exemptions for auctions. In particular, New Zealand removed the exemptions for sale by auction in 2014. The impacts of this change are unclear on the New Zealand auction market in relation to the throughput of goods and the prices paid for goods at auction. These are the types of impacts that this RIS chapter is seeking information on for the Australian context.

### CONSUMER GUARANTEES AT AUCTIONS IN NEW ZEALAND

The Consumer Guarantees Act will apply if the seller is in trade and the property is usually purchased for personal, domestic or household use. People are not usually in trade when they sell property they initially bought or acquired for personal use and this is often the case for online bidding sites like Trade Me (A New Zealand auction site).

Under the Consumer Guarantees Act, goods must:

- match their description
- have no undisclosed defects
- be fit for their normal purpose
- be safe, durable, and of a reasonable quality
- be acceptable in look and finish.

65. On the other hand, removing the exemptions may not remove all confusion for a consumer seeking to exercise their rights. The seller (rather than auctioneer, as the seller's agent) would remain responsible for the provision of remedies under the ACL. Some confusion may result for consumers if the responsible party is not made clear.

### Impact Analysis

66. Compliance costs under Option 4 would be significantly higher than the other options as this option affects all auctions, regardless of whether they are online or not. This would require all businesses selling goods through auctions to be aware that they have increased responsibilities in relation to consumer guarantees.
67. All consumers purchasing goods at auctions would have increased confidence in determining their bidding strategy. The complete removal of these exemptions would mean that at all auctions consumers would have protections if there is a failure with the goods they purchase.
68. This option would dramatically simplify the consumer guarantees regime for consumers purchasing at auction. Rather than having a mix of exemptions depending on the medium through which an auction occurs they would generally have access to the consumer guarantees.
69. Similarly, for businesses who sell goods at auction and through retail channels, there is the prospect of simplification through one set of rules governing consumer guarantee liability. This may raise the prospect of familiarisation costs being less for such businesses.

70. Confusion may still exist in the auctions regime as many goods sold at auction may not be inside the scope of ‘trade or commerce’. That is, in the event of a failure to meet the guarantees, buyers would only have a right to a consumer guarantee remedy against a seller acting in trade or commerce.<sup>7</sup> It may not be clear to buyers in an auction whether the article has been offered for sale by a person in trade or commerce. A similar observation has been made in the context of New Zealand’s repeal of its auctions exemption.<sup>8</sup>
71. Sellers of goods at auctions could experience benefits from the approach in option four if consumers are willing to develop more aggressive bidding strategies. This RIS is particularly interested to identify if consumers are willing to pay higher prices for goods sold at auctions if they came with the full range of consumer guarantees. At present it is unclear that this is likely to be the case. An increase in price for individual goods sold at auctions would also benefit auctioneers through increases in commissions on sales.
72. However it is unclear whether any possible increase in prices could be diffused by a reduction in throughput in auction houses. Sellers may introduce the use of high reserve prices to ensure that any future liabilities are covered. With these increased costs sellers of goods may also seek to use alternative strategies to dispose of their goods resulting in fewer goods entering the auction market. Additionally, if there was a reduction in supply of goods sold at auction consumers may have reduced choice when purchasing at auctions. However, it may also be possible consumers may look to purchase like for like goods equally through auctions and traditional retail outlets.
73. Auctioneers would face significant costs in adjusting to this system. As in options two and three, under this option they would be required to train staff in relation to the new requirements, and they would need to develop systems to connect sellers and consumers in the event of product failure (in the scope of the consumer guarantees).

BENEFITS	COSTS
<ul style="list-style-type: none"> <li>• Consumers will be more confident when purchasing at auctions. Consumers can make purchasing decisions in the knowledge that their purchases are protected by consumer guarantees.</li> </ul>	<ul style="list-style-type: none"> <li>• Increased compliance costs due to the need to be aware of the revised framework, consumer education and the possibility of being liable for consumer guarantees.</li> </ul>
<ul style="list-style-type: none"> <li>• Simplifies the consumer guarantee framework for all parties using auctions, reducing their search costs to determine if the consumer guarantees apply.</li> </ul>	<ul style="list-style-type: none"> <li>• Significant likelihood that businesses may begin to introduce reserve prices for goods sold by auctions to cover the potential for future liabilities relating to consumer guarantees.</li> </ul>
<ul style="list-style-type: none"> <li>• There could potentially be higher prices for individual goods sold at auctions.</li> </ul>	<ul style="list-style-type: none"> <li>• Possible higher prices for individual goods sold at auctions.</li> </ul>

7 This same scenario applies in relation to consumer purchasers from businesses on online platforms like Ebay. At present, it is common for sellers on Ebay to identify themselves as businesses. However this same practice has not emerged for businesses selling via auction. One off sales by individuals are not likely to be in trade or commerce.

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

BENEFITS	COSTS
<ul style="list-style-type: none"> <li>One level of consumer protection applies across all business sales to consumers.</li> </ul>	<ul style="list-style-type: none"> <li>Possible reduction in the volume of goods sold through auctions as businesses seek other low cost means to dispose of goods, such as dumping or overseas markets.</li> </ul>
	<ul style="list-style-type: none"> <li>Possible lower commissions for auctioneering facilities in the event of reduced volume of goods sold through auction facilities.</li> </ul>
	<ul style="list-style-type: none"> <li>All auctioneering facilities and sellers of goods would need to provide training to staff regarding the changes.</li> </ul>
	<ul style="list-style-type: none"> <li>All auctioneering facilities may need to develop mechanisms to link consumers with sellers in the event of a product failure.</li> </ul>
	<ul style="list-style-type: none"> <li>All auctioneering facilities and sellers of goods would need to update their websites regarding the changes.</li> </ul>
	<ul style="list-style-type: none"> <li>Sellers of goods would have costs through providing additional information to consumer regarding the nature of their goods.</li> </ul>
	<ul style="list-style-type: none"> <li>Possible reduction in choice of goods being sold at auction as business seek other low cost means to dispose of goods, such as dumping or overseas markets.</li> </ul>

## FOCUS QUESTIONS

### For consumers

- If you rarely, or do not bid, at online auctions now, would you be more willing to consider bidding if the goods came with the full range of consumer guarantees?
- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?

### For businesses

- What benefits do you see as potentially flowing to your business if goods sold at auction came with the full range of consumer guarantees?
- When disposing of goods via auction, would you seek to introduce reserve prices to cover any potential liabilities from the consumer guarantees?
- Apart from auctions what mechanisms exist for you to dispose of goods that cannot be sold through conventional retail channels? Do these alternatives have higher costs and what are these costs?
- What costs would be associated with removal of the exemptions for auctions from the consumer guarantee framework?

## FOCUS QUESTIONS

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Throughout this consultation paper there are a number of detailed questions for stakeholders to answer to better define the problem and assess the costs and benefits of the different options. Stakeholders lodging formal submissions are encouraged to refer to these detailed questions in their submissions. The focus questions from throughout this chapter are set out below for ease of reference.

### FOR BUSINESSES

- Are you aware that you have obligations under the consumer guarantee framework when selling goods through auction and do you have mechanisms in place to ensure to inform consumers of these rights?
- How many goods are sold through your auction house each year? How many of these are: sold only in person; sold only online; or sold in person but with online bidding allowed?
- What is the average value of goods sold through your auction house/platform?
- What initiatives is your business taking to increase the confidence of consumers purchasing online, and provide redress when things go wrong?
- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- What costs do you see associated with the provision of information regarding the quality of goods?
- How many bidders on average are there for each good sold? Does this vary significantly for online as opposed to in person auctions?
- Do you offer the opportunity to inspect goods? If so, for how long are goods generally offered for inspection?
- What do you consider a reasonable opportunity for inspection would involve?
- Do you consider that any of the consumer guarantees are inappropriate for goods sold through “online only” auctions, and which guarantees and why?
- Would you look to provide a reasonable opportunity to inspect with a view to reducing the scope of your consumer guarantee liability?
- What costs would you face in updating your website’s terms and conditions to adjust to the new regime?
- To what extent are your staff already aware of their responsibilities in relation to consumer guarantees? What costs would be associated with training staff, were the exemptions framework to change as outlined in this option?
- Do you offer an online portal in conjunction to your ‘traditional auction’? If so, what percentage of your sales goes through this mechanism?
- For regional auctioneers, what percentage of your sales comes from bidders in different locations to the ‘traditional auction’?

**For Businesses (continued)**

- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- If all online auctions received access to all consumer guarantees, would you be less willing to auction your goods through an online portal or by a business that offers an online portal?
- What benefits do you see as potentially flowing to your business if goods sold at auction came with the full range of consumer guarantees?
- When disposing of goods via auction, would you seek to introduce reserve prices to cover any potential liabilities from the consumer guarantees?
- Apart from auctions what mechanisms exist for you to dispose of goods that cannot be sold through conventional retail channels? Do these alternatives have higher costs and what are these costs?

**FOR CONSUMERS**

- Are you aware that you have some consumer guarantee rights when purchasing at an auction?
- Have you ever purchased a good from an auction without inspecting the good? If yes, how often, why were you unable to inspect and was a detailed condition report made available?
- What steps do you take to make an informed bid when considering an article at auction if you do not have a reasonable opportunity to inspect the goods?
- Do you physically inspect goods before you place a bid? How does it influence your bidding strategy? Do you bid in person or remotely and why?
- Where you have been unable to inspect goods in person have you ever sought to have someone inspect on your behalf?
- Are you confident placing a bid in an online auction where there is not a reasonable opportunity to inspect the good, if the good has a comprehensive description? Were there opportunities available to seek further details about goods for sale?
- Have you ever purchased a good that did not meet your expectations through an auction? If so how was the problem remedied, and by who?
- Do you have an expectation when purchasing goods from auctions that the seller will assist in the event of a product failure?
- What classes of goods do you purchase at auction (used, new, or refurbished)?
- Have you bid through an online portal at a traditional auction? How frequently and on what types of good?
- When purchasing online, without inspecting a good, to what extent does the lack of inspection affect your bidding strategy?
- To what extent are you likely to bid more aggressively when you have access to greater information about a product?

### **For Consumers (continued)**

- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?
- What would you consider to be a reasonable opportunity for inspection? If the same good was being auctioned in person and online, would you still attend the auction in person?
- If you rarely, or do not bid, at online auctions now, would you be more willing to consider bidding if the goods came with the full range of consumer guarantees?
- To what extent would you ever consider seeking to contact a seller of a good from an auction in the event of a product failure?