

Fair Trading Act

Buying and selling at auction

Changes to the Fair Trading Act and Consumer Guarantees Act relating to auctions commenced on 17 June 2014



This fact sheet is intended to help consumers, sellers (vendors) and auctioneers understand their rights and obligations under the Fair Trading Act and Consumer Guarantees Act when buying or selling at auctions conducted by auctioneers.

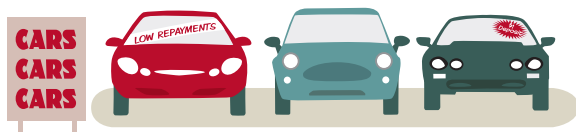
Auctions have always been a popular sales technique, used to sell many types of goods and services from small, inexpensive items through to cars and houses. Recent changes to the law tighten the rules around auctions when conducted by auctioneers.

Many different types of bidding processes are commonly referred to as auctions. For example, auctions on Trade Me. The Fair Trading Act prohibits misleading and deceptive conduct and false representations. These rules apply to **all** types of auction process whether they are conducted by auctioneers, online auctions, tenders or other competitive bidding process.

For information on the other key Fair Trading Act provisions that apply to auctions (misleading and deceptive conduct and false representations), please refer to our website www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets

What's changed?

New rules in the Fair Trading Act (Part 4A subpart 4) apply to auctions conducted by auctioneers, where a fee or commission is charged.



These rules **don't** apply to auctions such as those on sites like Trade Me or to charity auctions. This is because in an online auction like Trade Me, goods are sold directly by a seller to a winning bidder, and not through an auctioneer. An online bidding platform is usually just a place for members to buy and sell property directly to one another. And in a charity auction, usually no fee or commission is paid to the person conducting the auction.

Information about online auctions such as Trade Me and eBay auctions is available in our fact sheet *Buying and selling online* at www.comcom.govt.nz/fair-trading/changes-to-the-fair-trading-act/fact-sheets/buying-and-selling-online/

The Consumer Guarantees Act 1993 now applies to goods and services sold at auctions and by tender.

In this factsheet the term "property" refers to goods and services as defined in the Fair Trading Act (s2(1)).

What type of auctions do the new rules apply to?

The new rules apply to auctions that are conducted by (or on behalf of) anyone who carries on business as an auctioneer, and:

- the property is sold on behalf of a seller
 - bids for the property are placed with the auctioneer in real time, whether in person, by telephone, via the internet, or by any other means
- and*
- the property is sold when the auctioneer indicates.

A person is carrying on business as an auctioneer if they are in trade and charge a fee or commission or other payment for the sale (Auctioneers Act 2013 s5(3)).

The phrase “on behalf of a seller” means that the offer of goods or services makes it clear that the auctioneer is selling someone else’s property for them, as an agent or similar. They are not selling their own property. Property is not sold “on behalf of” someone if the owner of the property sells it directly.

Who is an auctioneer?

Auctioneers include:

- those registered under the Auctioneers Act 2013 or not required to be registered
- those engaged by a registered auctioneer to conduct auctions on its behalf
- some motor vehicles dealers and real estate agents even though they are exempted from registration under the Auctioneers Act.

EXAMPLE

Violet is organising a charity auction event and asks her friend, George to conduct the auction. George is not a registered auctioneer but does work as an auctioneer for the local auction house. George agrees to conduct the auction free of charge with all profits from the sale of the goods going to Violet’s chosen charity.

The charity auction is not covered by the Fair Trading Act auction rules or the Consumer Guarantees Act. This is because George is conducting the auction in a personal capacity and is not charging a fee for conducting the auction. So, he is not carrying on business as an auctioneer.

If George did not usually work as an auctioneer, the answer would be the same.

Auctions in action

Fair Trading Act

The Fair Trading Act auction rules:

- require that a notice of auction terms is made available for consumers to view before and during the auction
- state that the auction starts when the auctioneer invites the first bid and ends when the auctioneer makes it clear the bidding is closed
- provide that a bid can be withdrawn at any time before the end of the auction
- allow vendor bidding in certain situations
- treat the property as being sold at auction if it is unsold at the end of the auction but the auctioneer accepts within one working day of the auction an offer from a consumer who attended the auction.

EXAMPLE

Jane puts a painting up for auction at a local auction-house (which is a registered auctioneer). The auction house inspects the painting, and the catalogue describes it as a “Ralph Hotere 1969 Oil on Canvas.”

Tom wins the auction, but later is expertly advised that the painting is a copy. Tom has relied on the description given by the auction house and the auction house is in trade. The auction house is likely to have breached the Fair Trading Act. Jane may have also breached the Fair Trading Act if she is in trade or was a party to the misrepresentation.

A person is carrying on business as an auctioneer if they are in trade and charge a fee or commission or other payment for the sale.



Notice of auction terms

The terms of the auction must be readily available to all potential bidders before and during the auction; for example by posting a notice at the entrance of an auction room or making brochures of the terms available. Where potential bidders are not attending the auction in person, the terms must be available on a readily accessible website.

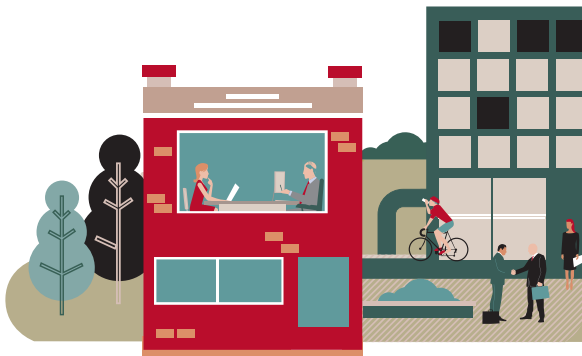
The notice of auction terms must be in writing and include:

- if any reserve price applies
- if vendor bids are allowed
- if the vendor is in trade.

These rules only apply to property that is usually purchased for personal, domestic or household use.

If different terms apply to different lots, the auction terms notice – or the auctioneer before starting the auction of each lot – must identify which terms apply to each lot.

The auctioneer may contract out of the Consumer Guarantees Act if the buyer of the property is also in trade, but only if the notice of auction terms clearly states that this exception applies.



Vendor bids

A vendor bid is a bid made by the seller or any person on their behalf (including an agent or auctioneer). The Fair Trading Act auction rules allows an auctioneer to accept a vendor bid during an auction where:

- the notice of auction terms specifies that vendor bids are permitted (for that lot)
- a reserve price is set
- the vendor bid is below the reserve price
- the auctioneer clearly identifies each vendor bid when it is made during the auction.

Auctioneers should clearly identify vendor bids; for example, the “*seller is bidding*” or “*vendor bid*”, rather than using phrases like, “*the bid is directed at me*” or “*the bid is with me*”. Given the fast moving nature of auctions, auctioneers should avoid jargon that makes it unclear whether the bid is on behalf of the vendor or from a prospective purchaser.

If the property has not sold because the highest bid did not meet the reserve (passed in), then any advertising or other representation using a vendor bid as the amount at which the property was passed in is misleading.

EXAMPLE

Sam is selling his car at a vehicle auction and sets a reserve price of \$5,000. One person bids on his car and Sam bids against him. The car passes the reserve price. The auctioneer keeps taking Sam’s bids, saying “the bid is in the room” rather than clarifying that the seller is bidding. This is illegal under the Fair Trading Act. Sam has misrepresented the price of the car by bidding above the reserve price, and the auctioneer has breached the auction process rules.

🔗 You can read more about how the vendor bidding rules apply to other bidding processes (including online auctions such as Trade Me and eBay) in our fact sheet *Buying and selling online* at www.comcom.govt.nz/fair-trading/changes-to-the-fair-trading-act/fact-sheets/buying-and-selling-online

After the auction

Within 10 working days of the auction, the auctioneer must give the seller the proceeds of the sale (less auction costs and fees) and an account of the sale. Details of the sale must include:

- the winning bid
- the amount of any tax
- the auctioneer's commission or other deductions
- the net amount payable to the seller.

A seller can ask for the proceeds and an account of the sale earlier than 10 working days. In this case, the auctioneer must comply with the request within five working days.

An auctioneer does not need to comply with these post-auction requirements if:

- the seller is in trade or is selling goods not normally purchased for personal, domestic, or household use or consumption, and the seller agrees that these requirements need not apply
- the auction was for land or an interest in land and was conducted by a licensed real estate agent where the provisions outlined in the Real Estate Agents Act applies instead.

Consumer Guarantees Act

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.

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.



EXAMPLES

Tom buys an olive-picking machine at the local auction-house but soon discovers that it is not working. Tom wanted to use the olive-picking machine on his lifestyle block where he grows olives as a hobby. The Consumer Guarantees Act is unlikely to apply as an olive-picking machine is unlikely to be usually purchased for personal, domestic or household use. But Tom may have rights under the Fair Trading Act if the condition of the machine was misrepresented to him.

Jane goes to an auction for a household refrigerator. The seller (a company) states in the auction notice terms that any buyer who is in trade will not be able to rely on the warranties in the Consumers Guarantees Act. Jane buys the fridge for her company's office, but discovers that it has undisclosed defects and is not fit for use. Jane cannot rely on the Consumer Guarantees Act, because the sale was business-to-business and the Act was excluded by the auction notice terms. She may have rights under the Fair Trading Act, if there was some misrepresentation about the condition of the fridge.

Where the Consumer Guarantees Act would normally apply, the seller may exclude the application of that Act if the property is purchased by a person who is also in trade. But they can only do this if the notice of auction terms clearly states that this exception applies.

The Commerce Commission does not enforce the Consumer Guarantees Act; consumers must bring their own action, which can include using the informal Disputes Tribunal process. But any trader who makes misleading representations about the rights that consumers have under the Consumer Guarantees Act (or under any other law) may breach the Fair Trading Act which the Commission does enforce.

🔗 You can find out more about your rights under the Consumer Guarantees Act at www.consumeraffairs.govt.nz/for-consumers/law/consumer-guarantees-act

The new Auctioneers Act

The Auctioneers Act 2013 requires any person who carries on business as an auctioneer to be registered. However exemptions apply, for example, section 48 of the Real Estate Agents Act 2008 and the section 141 Motor Vehicles Sales Act 2003. The Fair Trading Act auction rules still apply to these auctions.

🔗 The registration process for auctioneers is managed by the Ministry of Business, Innovation and Employment. You can find out more about registration and the online register of auctioneers at www.mbie.govt.nz/what-we-do/auctioneers-registration

Registered auctioneers are required by the Auctioneers Act to keep a written record of the details of each auction. This includes details on:

- the seller
- the property
- the person who conducted the auction
- the bids received
- the price of sale
- the date on which the proceeds were paid to the seller.

Sellers, the Commission and the police can ask to see the written record of an auction. The auctioneer must make the written record of an auction available for inspection by the Commission if requested.

Penalties

Courts can fine companies found guilty of breaching provisions of the Fair Trading Act up to \$600,000. Individuals may also be found guilty for breaching the Act either by committing the breach themselves or by aiding and abetting a company or another person to breach the Act. The maximum fine for individuals is \$200,000.

The court can also impose a management banning order against anyone convicted of these offences on two or more separate occasions within a ten year period.

Some provisions have a lower maximum penalty including those relating to auctions, which have a maximum fine of \$10,000 for an individual or \$30,000 for a body corporate. The court cannot impose a management banning order against anyone convicted of offences that carry the lower maximum penalty.

Registered auctioneers are required by the Auctioneers Act to keep a written record of the details of each auction.



This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

You can subscribe for information updates at www.comcom.govt.nz/subscribe

Contact us with information about possible breaches of the laws we enforce:

Phone: 0800 943 600 **Write:** Contact Centre, PO Box 2351, Wellington 6140 **Email:** contact@comcom.govt.nz

