



Kris Herbert

TRADING ON-LINE

As more and more goods are moved through on-line auctions, such as TradeMe, the legislation governing who qualifies as a trader and what exactly an auction is has been put to the test.

The Consumers' Institute is calling for changes to the law and TradeMe is acknowledging the problem by publishing guidelines for buyers and sellers, but behind the bright colours of on-line auctions there are a lot of grey areas.

The internet can be a valuable tool for moving stock, as firms like The Clearance Company have found out. The Clearance Company – which sells clearance stock through TradeMe, newspaper advertisements and warehouse sales – has opted to set up as a TradeMe 'Store'.

TRADEME STORE

For \$75 a month, this TradeMe Store distinction gives traders an opportunity to attach their own brand to the products they sell. For each TradeMe Store there is a page of product listings, a page of information and contact details for the company, and a page detailing the company's feedback from other TradeMe members who have had transactions with the company. All the store's product listings will also appear in

the relevant categories for browsing and searching.

To apply for on-line store status, TradeMe requires the seller to have at least 50 positive feedbacks.

Mike O'Donnell, head of business at TradeMe, says the on-line store is a cheap route to market for on-line

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retailers. "It's \$75 a month. Compare that to what it would cost to employ a development company to build a website and you're looking at \$10,000 to \$15,000. You pay a hosting company on top of that, and any way you look at it, \$75 a month is a reasonable investment."

And that's only half the battle, he says. "Anybody can build a website. TradeMe is giving you the traffic as well."

BRAND BUILDING

It works for The Clearance Company. Spokesman Kirk MacGibbon says the

decision to use TradeMe Store as one of its outlets was based on the sheer volume of people visiting TradeMe. There's no denying that TradeMe is a busy market-place. The last time I clicked onto the TradeMe website it was 4.30 p.m. on a Friday. Its stats showed there were 42,000 people on-line and 754,278 items for sale.

"If you've got a mountain and you've got Mohammed," MacGibbon says, "then TradeMe is the mountain." And we all know which is easier to move.

The Clearance Company also sees TradeMe Store as a way to build its brand's credibility. "Increasingly, people use us an e-tail outlet. The infrastructure is already there. The market is already there."

Last year, 2500 TradeMe members crossed over from occasional selling to full-time selling. O'Donnell expects that number to at least double this year.

BUSY CASUALS

The Clearance Company has set itself up as a business and it understands its responsibilities under the consumer

legislation. But, what about the casual seller who crosses the line into trading without realising? And who, exactly, is bound by consumer legislation and who is not?

All traders are still responsible to meet the requirements of the Consumer Guarantees Act and Fair Trading Act. But there is no hard and fast definition of a trader – unless you're a car dealer.

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Anybody who sells six or more motor vehicles a year (or imports three or more) is considered a trader by the Ministry of Consumer Affairs. It doesn't matter if you sell those cars through TradeMe or your own garage. Unless they can prove they are not selling those cars for gain, motor vehicle traders must be

registered and comply with the Motor Vehicles Trading Act.

Second-hand dealers and pawnbrokers also have their own legislation.

Generally speaking, the basic differences between these two Acts is that the Fair Trading Act covers claims about products and services made before the sale, and the Consumer Guarantees Act covers the quality of those products and services after they've been purchased.

The legislation is a bit grey and the Ministry of Consumer Affairs says this is deliberate.

"The definition of 'in trade' is deliberately wide in order to cover as many traders as possible. Once a definition is narrowed, it can often have unintended consequences – excluding some traders who should be covered," says Julie Allan, senior

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communications adviser. "This broad meaning covers all commercial activities. Few undertakings, except 'one-off' private transactions, escape the jurisdiction of the Consumer Guarantees Act."

GUARANTEES ACT

The Consumer Guarantees Act says that sellers and importers automatically make several guarantees to buyers. They must guarantee the goods are of acceptable quality and will do the job they're intended for. They must match the picture and description on the auction listing.

Importers – however small-scale – have the same responsibilities as manufacturers to guarantee to provide spare parts and repair facilities, or to specifically state otherwise before the sale.

These responsibilities apply to 'traders' who are selling to private consumers (rather than businesses).

But there's a major exemption. The Consumer Guarantees Act does not apply to goods sold by auction (on-line or otherwise).

There's a pretty significant loophole in the legislation here. When goods are sold by auction, or competitive tender, the Consumer Guarantees Act does not apply.

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Auctions are covered by the Auctioneers Act – but this Act defines an auction in a way that means on-line auctions do not fit the definition of an auction for the purposes of the law.

So, if you click 'buy now' on TradeMe, and purchase an item from a person defined by the law as a trader, you're protected by the Consumer Guarantees Act. If you win the item in an auction, you're not. Traders can't skirt around this by setting the opening price to equal the 'buy now' price. The Consumer Guarantees Act automatically applies to those circumstances.

Chief executive of the Consumers' Institute, David Russell, says the problem is that the current law – particularly the Auctioneers Act – is not appropriate for on-line auctions. "We believe anyone who is doing business on the web must comply with the Consumer Guarantees Act."

The Consumers' Institute has received complaints from people who have purchased faulty products through TradeMe and find they have no recourse. But the Ministry of Consumer Affairs says there are still protections in place.

"The Fair Trading Act applies to sales by auction by traders and the Contractual Remedies Act applies to private auction sales; so if a seller at auction misleads, deceives, or makes

a misrepresentation, buyers do have redress through the Disputes Tribunal."

The Fair Trading Act says goods must be accurately represented as new, reconditioned, shop-soiled, or second-hand.

SECOND-HAND

TradeMe started with its listings being 100 per cent used goods, but now the listings are around 40 per cent new goods – and O'Donnell says that percentage is growing.

The new Second-hand Dealers and Pawnbrokers Act – which came into force on 1 April 2005 – aims to make it *harder* for thieves to sell stolen goods and make it *easier* for police to recover those goods. The new Act specifically recognises the role of internet auction providers (like TradeMe) and requires them to keep records of all transactions for up to 12 months. But there are a lot of categories – such as motor vehicles, books, furniture, property, art, baby gear and most clothing – to which the Act does not apply.

Things that do apply, like ornamental china, leather clothing, jackets, coats and scrap metal, are included in the Act because they are more commonly traded as stolen goods.

So, some people who sell second-hand goods through TradeMe will be required to register with the Ministry of Justice and keep records as to the source of their purchased goods. Failure to do so can result in fines of up to \$20,000.

The Fair Trading Act says goods must be accurately represented as new, reconditioned, shop-soiled, or second-hand.

Anyone doing business on TradeMe needs to keep in line with the Fair Trading Act's requirements not to advertise second-hand goods as new.

"The way goods are described must not mislead or deceive customers about what they are getting," the Ministry says.

The Consumers' Institute is currently working with TradeMe to develop a code of practice for on-line retailers. The Clearance Company is going above and beyond the legislation saying it will uphold its responsibilities under the Act, even when goods are sold by auction. But not everyone will.

"Inevitably, there will be some ratbags out there that don't want to have a bar of anything voluntary and that's where there needs to be some legislation changes – but that will be a very long process taking years, rather than months."

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Although O'Donnell says TradeMe is a 'transparent community' – where buyers can make assumptions about whether they're dealing with a private seller or business by reviewing feedback and previous listings – the Consumers' Institute would like to see the Fair Trading Act enforced to stop professional traders presenting themselves as private individuals when they are businesses.

TradeMe has taken steps to help sellers determine if they're private or business traders and to inform them of their responsibilities under consumer legislation and with GST and income tax.

"It's ultimately up to the individual," O'Donnell says. "We provide a market-place, and try to ensure people are as well-informed as possible – but people need to make their own decisions." ■

By **Kris Herbert**, a freelance writer based in Lyttelton and a regular contributor to *NZRetail*.