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## Enhancing Trust in Online Auctions: eBay's Australian Experience With Code and Law

*Operators of online auction venues, such as eBay, face competing demands. Most of those operators are reliant on income from fees paid by sellers and therefore must provide technical innovations and a contract structure favourable to those sellers. Simultaneously, the operators must lower the risk of bidding on auctions hosted by the site to ensure a steady supply of potential buyers (and successfully completed auctions).*

*Lowering the risk to the buyer and the seller in an online auction will tend to lower their transaction costs (the cost of engaging in the transaction itself) and may enable the auction website to generate network effects which increase its market share. This article examines the decisions resolving two disputes relating to online auctions hosted by eBay Australia. It highlights the inter-relationship between the common law and statutory law in regulating online auctions to provide higher degrees of trust (over and above that generated through the use of architecture, norms and markets), thus lowering overall risk and transaction costs for both buyers and sellers.*

### I. The Importance of Regulating Trust in Online Auctions

Lawrence Lessig's seminal book, *Code and Other Laws of Cyberspace*,<sup>1</sup> used an institutional analysis in identifying four methods of Internet regulation: *law*, *architecture* (such as software code), *norms* and *markets*. eBay's auctions are regulated by each of these forms of regulation.

eBay folklore suggests that the site was started as a means of enabling the founder's wife to sell her Pez dispenser collection.<sup>2</sup> However, it appears that this was a story created and promoted by eBay's public relations department, as the first item sold on the site was, in fact, a broken laser pointer.<sup>3</sup> eBay was founded by a young, but experienced, technology entrepreneur, *Pierre Omidyar* in August 1995. Having coded the site during his spare time, *Omidyar* initially permitted free auctions (regulation through architecture/code). However, as the site grew in popularity causing his ISP to significantly raise their fees due to the bandwidth it was consuming (regulation by market forces), he started to charge sellers a fee based upon a percentage of the final sale price for each auction.<sup>4</sup> *Omidyar* was also conscious to ensure that he minimised his legal obligations by establishing eBay as a facility for users to hold auctions, rather than holding auctions himself<sup>5</sup> (regulation by law).

The balanced combination of these regulatory choices (code, market and law), together with eBay's first-mover advantage in the fast-growing online-auction space led to significant network effects,<sup>6</sup> enabling eBay to be profitable in its first month of operation.<sup>7</sup>

In a 2001 article, *Calkins* argues that eBay's business model is dependent upon trust between its buyers and sellers.<sup>8</sup> When it was a relatively small community, eBay

first regulated its members' behaviour through norms. It required members to register accounts (though a member could easily create a new account if they desired) which gave some permanence to their reputation and activities. As eBay's membership grew and became more diverse, cultural norms broke down and more sophisticated methods for developing trust were required.<sup>9</sup>

To develop trust across its more diverse membership, eBay implemented an architectural (code-based) solution through a feedback mechanism in which buyers and sellers could leave positive, neutral or negative feedback about the counterparties in their transactions. In 2007, eBay expanded this code-based feedback mechanism by making it more granulated (i.e. a single feedback ranking could be separated into feedback on the accuracy of the item description, postage time and fees and communication<sup>10</sup>).

eBay has also used third-party service providers to further increase the level of trust in its auctions. It has partnered with payment escrow services<sup>11</sup> and now provides buyers with free fraud insurance for purchases of some large-ticket items,<sup>12</sup> such as automobiles, through its auctions. eBay had attempted to establish its own payment service, but eventually decided that it would be more effective to acquire PayPal, a third-party payment service provider, which had first mover advantage and significantly

▷ John Selby, Macquarie University, Sydney. Further information about the author at p. 192.

1 The latest version of this important book is available for free download at: <http://pdf.codelv2.ccl/Lessig-Codev2.pdf> (last accessed 30 October 2007).

2 Knowledge@Wharton, (2002), eBay: Last Man Standing, available at: <http://knowledge.wharton.upenn.edu/article.cfm?articleid=539> (last accessed 30 October 2007).

3 *Cohen, Adam*, (2003), *The Perfect Store*, Back Bay Books, Boston, chapter 1.

4 eBay does not charge a Buyer's Premium on its auctions, unlike, for example, the auctioneer Grays: see clause 3.2 of the Grays Bidder's Agreement, available at: [www.graysonline.com.au/help/AU/bid\\_agreement.asp](http://www.graysonline.com.au/help/AU/bid_agreement.asp) (last accessed 30 October 2007).

5 *Ibid.*

6 Network effects are positive feedback loops in which initial success/growth spurs further success/growth. A seller and a buyer who both complete an auction successfully are more likely to engage in further auctions as compared to a situation where either of them is unsuccessful in completing the auction (eg due to poor service, non-payment or non-delivery). For an overview of network effects, see *Vromen, J.J.*, (1995), *Economic Evolution: An Enquiry into the Foundations of New Institutional Economics*, Routledge, New York, at p. 212.

7 *Cohen, Adam*, (2003), *The Perfect Store*, Back Bay Books, Boston, chapter 1.

8 *Calkins, M.M.*, (2001), *My Reputation Always Had More Fun Than Me: The Failure of eBay's Feedback Model to Effectively Prevent Online Auction Fraud*, Vol. 7, *Richmond Journal of Law & Technology*, No. 4, p. 33 at p. 34.

9 *Calkins, M.M.*, (2001), *My Reputation Always Had More Fun Than Me: The Failure of eBay's Feedback Model to Effectively Prevent Online Auction Fraud*, Vol. 7, *Richmond Journal of Law & Technology*, No. 4, at paras 34-56.

10 eBay, (2007) Detailed Seller Ratings, available at: <http://pages.eBay.com.au/help/feedback/detailed-seller-ratings.html> (last accessed 30 October 2007).

11 eBay, (2007), Using Escrow Services, available at: <http://pages.eBay.com.au/help/tp/payment-escrow.html> (last accessed 30 October 2007).

12 eBay, (2007), Vehicle Purchase Protection, available at: [http://pages.eBay.com.au/motors/Vehicle\\_Purchase\\_Protection.html](http://pages.eBay.com.au/motors/Vehicle_Purchase_Protection.html) (last accessed 30 October 2007).

## Enhancing Trust in Online Auctions: eBay's Australian Experience With Code and Law

greater market share than eBay's internal payment service.<sup>13</sup>

The market regulated eBay's (and its members') activities more stringently during its formation and early growth (when it faced many competing online auction services).<sup>14</sup> However, eBay's success in harnessing network effects has meant that it is now by far the largest online auction service provider.<sup>15</sup> The extent to which eBay has been able to raise its fees and commissions over the past few years suggests that the market may be less effective in regulating eBay's activities now than it was in the past.<sup>16</sup>

eBay also has written contracts with its members and legally enforceable contracts can be formed between those members in certain situations. However, the relatively low value of many auctions conducted on eBay as compared to the very large transaction costs associated with enforcing legal rights in the courts means that legal remedies are not regularly sought from courts by dissatisfied eBay buyers or sellers.<sup>17</sup> Most eBay disputes are either settled privately between the parties, or brought to eBay's free dispute resolution forum/\$15 mediation service provided by SquareTrade.<sup>18</sup>

## II. Two Key Cases of Trust in eBay Dealings

Two recent Australian court cases involving eBay and its members highlight the importance of law as one form of regulation which determines the level of trust members have in eBay's auctions.

- 13 Kane, M., (2002), eBay picks up PayPal for \$1.5 Billion, available at: [www.news.com/2100-1017-941964.html](http://www.news.com/2100-1017-941964.html) (last accessed 30 October 2007).
- 14 For example, even after eliminating its fees for auctions in 2005, Yahoo! Auctions ceased accepting new items for auction in most countries on 16 June 2007: see [http://files.shareholder.com/downloads/eBay/185996430\\_x0x137793/9ca4f98a-1fb8-4559-8a63-22fc4ce23b8b/EBAY1017a.pdf](http://files.shareholder.com/downloads/eBay/185996430_x0x137793/9ca4f98a-1fb8-4559-8a63-22fc4ce23b8b/EBAY1017a.pdf) (last accessed 30 October 2007).
- 15 eBay was on target to host more than 2 Billion auctions in the calendar-year 2007: see eBay Announces Third Quarter 2007 Financial Results, available at: [http://files.shareholder.com/downloads/eBay/185996430\\_x0x137793/9ca4f98a-1fb8-4559-8a63-22fc4ce23b8b/EBAY1017a.pdf](http://files.shareholder.com/downloads/eBay/185996430_x0x137793/9ca4f98a-1fb8-4559-8a63-22fc4ce23b8b/EBAY1017a.pdf) (last accessed 30 October 2007).
- 16 For example, see Walker, L., (2005), eBay Sellers Protest Planned Fee Increases, Washington Post, 16 January 2005, available at: [www.washingtonpost.com/wp-dyn/articles/A11364-2005Jan15.html](http://www.washingtonpost.com/wp-dyn/articles/A11364-2005Jan15.html) (last accessed 30 October 2007). An online petition protesting eBay's fee increases has attracted almost 28 000 signatures: [www.petitiononline.com/eBayfee/petition.html](http://www.petitiononline.com/eBayfee/petition.html) (last accessed 30 October 2007).
- 17 The plane which formed the basis of the dispute in *Smythe v. Thomas* (discussed below) was valued at between \$A150,000 and \$A250,000. By way of comparison, the author has successfully participated in more than thirty eBay auctions with an average value of less than \$A50 per auction.
- 18 eBay, (2007), Dispute Resolution Overview, available at: <http://pages.eBay.com/services/buyandsell/disputeres.html> (last accessed 30 October 2007). More information on SquareTrade is available at: [www.squaretradedisputeresolution.com/detailed-information.html](http://www.squaretradedisputeresolution.com/detailed-information.html) (last accessed 30 October 2007).
- 19 Naughton, R., (2007), Keith Meggs: The Commonwealth Aircraft Corporation, available at: [www.ctie.monash.edu.au/hargrave/MEGGS\\_CAC.html](http://www.ctie.monash.edu.au/hargrave/MEGGS_CAC.html) (last accessed 3 September 2007). Australian National Aviation Museum, (2001), Wirraway, available at: [www.aarg.com.au/Wirraway.htm](http://www.aarg.com.au/Wirraway.htm) (last accessed 3 September 2007).
- 20 Naughton, R., (2007), Keith Meggs: The Commonwealth Aircraft Corporation, available at: [www.ctie.monash.edu.au/hargrave/MEGGS\\_CAC.html](http://www.ctie.monash.edu.au/hargrave/MEGGS_CAC.html) (last accessed 3 September 2007).
- 21 Ong, T., (2006), Historic Fighting Plane in eBay Dogfight, Sydney Daily Telegraph, 2 October 2006, available at: [www.news.com.au/dailytelegraph/story/0,,20508505-5005941,00.html](http://www.news.com.au/dailytelegraph/story/0,,20508505-5005941,00.html) (last accessed 30 October 2007).
- 22 *Smythe v. Thomas* [2007] NSWSC 844 at para 2.
- 23 *Ibid.*

### 1. Enforceability: *Smythe v. Thomas* [2007] NSWSC 844

#### a) Facts

During the Second World War, the Commonwealth Aircraft Corporation manufactured four types of aircraft in Australia: the Boomerang, Kangaroo, Wackett and Wirraway,<sup>19</sup> of which a relatively small number survive today. The Wirraway was principally used as a trainer aircraft, but some did see combat (including one which shot down a Zero fighter over Gona in 1942<sup>20</sup>).

The defendant, *Thomas*, owned a restored WWII Wirraway airplane ("the Plane") which he listed for sale on eBay on 15 August 2006 with a minimum bid of \$A150,000. Whilst the defendant had a history of successful bids for items auctioned on eBay, it appears that this was his first time as a seller on that site.<sup>21</sup> Having already discussed the Plane with the defendant in a telephone conversation two days earlier, just seconds before the auction closed on 25 August 2006,<sup>22</sup> the plaintiff, *Smythe*, bid \$A150,000 for the Plane.<sup>23</sup> After the auction ended, eBay notified both *Smythe* and *Thomas* by email that *Smythe* had "won" the auction for the Plane.

During the course of the ten-day auction period, *Thomas* had, outside of the eBay auction process, negotiated with another potential buyer in Queensland, who had offered \$A250,000 for the Plane. Although he had not cancelled the eBay auction prior to its close, *Thomas* sought to deny *Smythe's* claim to have acquired ownership of the Plane through the eBay auction process, instead desiring to sell it at the higher price to the Queenslander.

At the time of the auction, eBay's terms and conditions stated at clause 5.2:

"Binding Bids: Except for Items to which the Non-Binding Bid Policy applies, if you receive at least one bid at or above your stated minimum price (or in the case of reserve auctions, at or above the reserve price), you are obligated to complete the transaction with the highest bidder upon the item's completion, unless there is an exceptional circumstance, such as:

- 1) the buyer fails to meet the terms of your listing (such as payment method); or
- 2) you cannot authenticate the buyer's identity."

As this contract is between the Seller and eBay, a Buyer who has not received their item has no standing to sue under that contract. In such a situation, eBay's remedy under clause 9 of the contract include issuing warnings, suspending the Seller's account or terminating their membership.

Clause 14 of the eBay contract with the seller requires the seller to comply with all applicable domestic laws, including the common law and statutes.

*Smythe* launched an action in the NSW Supreme Court to enforce his claim to own the Plane based upon the existence of a contract as set out in section 60 of the Sale of Goods Act 1923 (NSW) ("Sales Act"). Whilst both parties agreed that NSW law regulated the dispute (and was the applicable law under eBay's terms and conditions), *Thomas's* defence argued that there was no contract between himself and *Smythe*, and that the only consequences of his renegeing on the auction sale was that

## Enhancing Trust in Online Auctions: eBay's Australian Experience With Code and Law

eBay had the contractual right under its terms and conditions to terminate his membership of the auction site.<sup>24</sup>

### b) Held

*Rein AJ* held that the conduct of *Thomas* in setting up the eBay auction for the Wirraway "amounted to an offer to sell the Plane to a bidder who:

- 1) bid within the specified period;
- 2) made a bid of at least \$A150,000;
- 3) was the highest bidder of those who made bids in accordance with (1) and (2); and
- 4) did not qualify or seek to impose a qualification on their bid to which the seller had not previously indicated their willingness to consent".<sup>25</sup>

Therefore, three binding contracts existed in relation to this auction:

- 1) a contract between the seller and eBay (governed by the terms and conditions of membership);
- 2) a contract between the buyer and eBay (governed by the terms and conditions of membership); and
- 3) a contract between the buyer and the seller (governed by the Sales Act).<sup>26</sup>

After surveying French,<sup>27</sup> German<sup>28</sup> and American<sup>29</sup> judicial opinions regarding online auctions, *Rein AJ* drew some distinctions between a traditional physical auction and eBay's online auctions, including<sup>30</sup>:

- 1) the lack of a human agent with the power to execute a contract between the parties, who acts as agent for the seller; and
- 2) the ability for the online seller to withdraw the goods from sale prior to the fall of the hammer.

Despite these distinctions, His Honour ruled that an eBay auction could amount to a contract as section 8 of the Sales Act permits a contract to be formed in writing, by word of mouth, or through the conduct of the parties. Whilst "auction" is not defined in the Sales Act, section 60 states:

In the case of a sale by auction:

- (1) where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale,
- (2) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner: until such announcement is made any bidder may retract his or her bid,
- (3) where a sale by auction is not notified in the conditions of sale to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person: any sale contravening this rule may be treated as fraudulent by the buyer,
- (4) a sale by auction may be notified in the conditions of sale to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller,

- (5) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on the seller's behalf, may bid at the auction.

After analysing the features of an eBay auction, *Rein AJ* stated, "In circumstances where both the buyer and the seller agree to accept the terms and conditions of eBay, I see no difficulty in treating the parties as having accepted that the online auction will have features that are both similar and different to auctions conducted in other forums".<sup>31</sup> Whilst s. 60(2) of the Sales Act permits a variety of methods to close an auction, his Honour regarded the automatic closing of the eBay auction at a pre-defined time as equivalent to the falling of a hammer.

In relation to a dispute between the parties as to the time for delivery and the condition of the aircraft, his Honour recognised that the parties to an online auction could incorporate additional terms which had been agreed, or which had been the subject of representations, prior to the close of the auction.<sup>32</sup> Therefore, the telephone conversation between the parties three days prior to the closing of the auction did provide additional terms to the contract relating to payment time and the condition of the plane.

*Rein AJ* was willing to grant an equitable remedy of specific performance due to "the nature of the subject of the bargain, which is not only a fine looking aircraft, but is a vintage and unusual item".<sup>33</sup> Therefore, *Thomas* could not complete the sale of the Plane to the Queenslander and merely pay monetary damages to *Smythe – Smythe* was legally entitled to possess the Wirraway.

### c) Comment

Whilst it resolves a much larger volume of disputes than the courts, the decisions of eBay's dispute resolution service, SquareTrade, are not published. Therefore, potential eBay buyers and sellers who were not party to the transaction in dispute are not able to alter their behaviour on the basis of additional information. This NSW Supreme Court decision is of significant benefit for eBay and its members as the NSW Sales Act is drafted similarly to legislation in many other common-law jurisdictions. The willingness of the court to publicly specify the conditions under which it will enforce a contract for sale completed by online auction acts as a very public pronouncement which lowers risk and enhances trust between eBay members.

## 2. Protecting the Rights of Sellers: *eBay International AG v. Creative Festival Entertainment Pty Ltd* [2006] FCA 1768

The second Australian court decision highlights a situation where eBay took legal action to protect the rights of

24 *Smythe v. Thomas* [2007] NSWSC844 at para 22. eBay did terminate *Thomas*' site membership.

25 *Smythe v. Thomas* [2006] NSWSC 844, at para 39.

26 *Smythe v. Thomas* [2006] NSWSC 844, at paras 37 & 39.

27 *Chambre National des Commissaires Priseurs v. NART SAS* [2001] ECC 24.

28 MMR 2000, 280 Regional Court (LG) Munster (21 January 2000); MMR 2000, 278 Regional Appeal Court (OLG) Hamburg (14 December 2000).

29 *eBay Inc v. Bidder's Edge Inc* (2000) 100 F Supp 2d 1058.

30 *Smythe v. Thomas* [2007] NSWSC844 at para 28.

31 *Smythe v. Thomas* [2006] NSWSC 844, at para 35.

32 *Smythe v. Thomas* [2006] NSWSC 844, at para 63.

33 *Smythe v. Thomas* [2006] NSWSC 844, at para 71.

## Enhancing Trust in Online Auctions: eBay's Australian Experience With Code and Law

a controversial sub-set of its members – sellers who engage in ticket scalping.

### a) Facts

Creative Festival Entertainment (“Creative”) is the organiser of a major annual series of music festivals in Australia, known as “the Big Day Out”. Creative sold tickets to individuals through an online store, by telephone and through retail stores. Clause 6 of the conditions of sale which was printed on the tickets stated, “Should this ticket be re-sold or transferred for profit or commercial gain it will become voidable and the holder may be refused entry to, or ejected from, the venue.”

Demand for tickets to the Big Day Out concerts significantly exceeded supply in some capital cities in Australia. Creative was concerned about the actions of ticket scalpers who were re-selling tickets on eBay at significant premiums. Consequently, Creative released a public statement that tickets to the Big Day Out Festivals in January and February 2007 that are resold at a profit would be cancelled and that holders of such tickets would be refused entry to the festival.<sup>34</sup>

eBay sued Creative in the Federal Court for breaches of s. 51A(1) and s. 52 of the Trade Practices Act 1974 (Cth) because Creative had allegedly made false or misleading representations as to a future matter (i.e. that Creative lacked the means to detect every ticket which had been re-sold so as to accurately assert that it could, with a high degree of certainty, cancel all such tickets and refuse entry to their holders).

eBay also alleged that Creative had attempted to retrospectively incorporate restrictive terms into the contract for sale for the tickets by amending the terms of sale on its website.<sup>35</sup> Creative had drafted a new clause 6 which had the effect of automatically voiding a ticket which had been re-sold for a profit. eBay claimed that this violated the common law principle restated most recently by the Australian High Court in *Fay's Case*<sup>36</sup> that restrictive clauses within a contract could not be relied upon unless the party seeking to rely upon them had done “all that was reasonably necessary to bring the term to the other party's attention”.

### b) Held

The Federal Court ruled in favour of eBay, stating that the attempt to retrospectively incorporate the more restrictive clause was invalid. *Rares J* stated “If Creative wanted to

impose a condition of contract in the Ticketek online service it had to bring notice of such a condition to the attention of the purchaser... at the time of the purchase”.

By making the claim that it could enforce the new clause 6 and cancel tickets which had been re-sold for a profit, *Rares J* ruled that Creative was also engaging in misleading and deceptive conduct in violation of s. 52 of the Trade Practices Act. eBay was entitled to declaratory relief and an injunction to prevent Creative from continuing to make such claims. The judge was critical of the activities of scalpers who were “preying on the desire of music fans to attend an event which was sold out early to scalpers” and consequently declined to order Creative to publish advertisements correcting its misleading and deceptive conduct.

### c) Comment

When interpreting the meaning of re-sale restraint clauses for concert tickets, Australian courts will pay close attention to the language of the specific clause. This can be seen from the full Federal Court decision in *Hospitality Group*,<sup>37</sup> wherein it was a condition of the sale of the ticket for a Rugby Union match that a promise was made by the purchaser that the ticket would not be re-sold for a profit. In that case, the Australian Rugby Union awarded damages for breach of contract by Hospitality Group (who had re-sold such tickets for a profit).

#### aa) Impact on Ticket Sellers

The court in this case aided eBay sellers by re-enforcing their right to auction items which they were legally entitled to sell, even if such sales may offend a proportion of the public. Simultaneously, the court recognised the freedom of the parties to structure their contracts as they saw fit. However, in accordance with existing precedents, it would not permit unilateral post-contractual amendments, even if those changes were intended to prevent conduct of which the court disapproved.

When drafting contracts governing admission to future Big Day Out festivals, Creative could simply include the stronger protections against ticket scalping in a revised Clause 6 of its terms and conditions of sale, alternatively it could lobby the Parliament to seek greater statutory protection.

#### bb) Legislative Responses to Online Ticket Scalping

At least two Australian states have enacted legislative responses to perceived public anger at the activities of ticket scalpers. Victorian legislation only applies to the re-sale of tickets to sporting events, such as the Australian Rules Football League grand final which is hosted in Melbourne each year.<sup>38</sup>

The *Queensland Major Sports Facilities Act 2001* is considerably broader, regulating the scalping of tickets to any event (cultural, sporting, religious, etc) hosted by one of the seven declared Major Sports Facilities located in that state.<sup>39</sup> Since December 2006, section 30C(1) of that Act makes it an offence punishable by a fine of up to \$A1,500 for a person to re-sell (either within or outside Queensland) a ticket to such an event at a price more than 10 % higher than the ticket's face value. It is also an offence punishable by a fine of up to \$A375 for a person to buy such a ticket.<sup>40</sup> The Act does not permit the re-sale of event tickets if the re-sale of those tickets is prohibited

34 *eBay International AG v. Creative Festival Entertainment Pty Ltd* [2006] FCA 1768 at para 25–30.

35 *eBay International AG v. Creative Festival Entertainment Pty Ltd* [2006] FCA 1768 at para 27–8.

36 See the decision of Brennan J in *Oceanic Sun Line Special Shipping Company Inc v. Fay* (1988) 165 CLR 197 at 228–9.

37 *Hospitality Group Pty Ltd v. Australian Rugby Union Ltd* [2001] 110 FCR 157 per Hill and Finkelstein JJ at para 96–105.

38 See sections 17–25 of the Sports Events Ticketing (Fair Access) Act 2002 (Vic), available at: [www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/A1CA8D7BECDFCF51CA2573300009C07C/\\$FILE/02-47a005.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/A1CA8D7BECDFCF51CA2573300009C07C/$FILE/02-47a005.pdf) (last accessed 30 October 2007).

39 See Part 4A of the Major Sports Facilities Act 2001 (Qld), available at: [www.legislation.qld.gov.au/LEGISLTN/CURRENT/M/MajorSpFacA01.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/M/MajorSpFacA01.pdf) and subordinate legislation, available at: [www.legislation.qld.gov.au/LEGISLTN/CURRENT/M/MajorSpFacR02.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/M/MajorSpFacR02.pdf) (last accessed 30 October 2007).

40 Section 30C(2) of the Major Sports Facilities Act 2001 (Qld).

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## No Unilateral Online Contract Revision

in the contract of sale. Re-sale at higher prices by non-profit organisations is permitted. Interestingly, s. 30C(5) of that Act provides a statutory protection for the operators of public sale forums (such as eBay) from liability for the actions of scalpers who sell tickets in violation of ss. 30C(1) or (2). The Queensland Government has also established telephone and email hotlines to enable members of the public to report prohibited scalping activity directly to the Queensland Police.<sup>41</sup>

Despite examining the issue over the past few years, the most populous state in Australia, New South Wales (where eBay Australia is headquartered), has not passed legislation restricting ticket scalping,<sup>42</sup> instead relying upon the common law to regulate contracts for event tickets. Some festival promoters have reacted to this lack of legislation by changing the terms of their contracts and printing ticket purchasers' names and birthdates on each ticket (and later conducting identity checks at the gate to the festival).<sup>43</sup> This has led to claims that scalpers are engaging in regulatory arbitrage by targeting NSW events.<sup>44</sup>

### III. Conclusion

Trust between parties to a contract is an ephemeral, but critical, concept. That trust can be regulated by architecture, norms, markets and law. As can be seen from these cases, it is not sufficient for the parties to a complex system, such as eBay, to rely purely on any one, or sub-set,

of these regulatory tools. More effective regulation is achieved through generating synergies between them. One high-profile published court decision over an expensive item, such as a Wirraway plane, may generate an increase in trust between eBay users more effectively than thousands of feedback ratings or un-published mediations.

When the trust between eBay's buyers and sellers breaks down, eBay's natural bias in favour of the interests of its sellers was revealed by its decision to launch legal proceedings in the Creative case. The fractured cultural norms amongst eBay's buying members were insufficient to remove the economic incentives for high-volumes of ticket scalping sales to occur through the site. Only the external lobbying of Parliaments by buyers and concert-promoters is capable of regulating such behaviour (albeit in a patchwork manner).

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41 Major Sports Facilities Authority, (2007), Ticket Scalping, available at: [www.msfa.qld.gov.au/content/standard.asp?id=166&version=0&revision=0](http://www.msfa.qld.gov.au/content/standard.asp?id=166&version=0&revision=0) (last accessed 30 October 2007).

42 NSW Office of Fair Trading, (2007), Entertainment Industry: Scalping, available at: [www.fairtrading.nsw.gov.au/shopping/shoppingtips/entertainmentindustry.html](http://www.fairtrading.nsw.gov.au/shopping/shoppingtips/entertainmentindustry.html) (last accessed 30 October 2007).

43 The "Splendour in the Grass" festival in Byron Bay adopted this technique to counter complaints of ticket scalping. The festival organisers claimed that, as a result of this policy "last year there were no tickets on eBay": see [www.splendourinthegrass.com/FAQs/FAQs-Listing.html?FAQCategoryId=E5C58DB8-9D20-4ABA-B83C-82A580D4CEDA](http://www.splendourinthegrass.com/FAQs/FAQs-Listing.html?FAQCategoryId=E5C58DB8-9D20-4ABA-B83C-82A580D4CEDA) (last accessed 30 October 2007).

44 Moses, A., (2007), Fans Rage Against the Scalpers, Sydney Morning Herald, 28 September 2007, available at: [www.smb.com.au/articles/2007/09/28/1190486540211.html](http://www.smb.com.au/articles/2007/09/28/1190486540211.html) (last accessed 30 October 2007).