

# AUSTRALIAN JOURNAL OF COMPETITION AND CONSUMER LAW

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## EDITORIAL

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## ARTICLES

**Online Auctions Going! Going! Gone! Sold by the Person Engaging in Misleading or Deceptive Conduct!!!** – *Adrian Coorey*

The traditional form of auction is not the only form of auction that is enforceable by law. There are many forms of auctions, including online auctions, which are legitimately enforceable contracts. Where the online auction is recognised as a legitimate form of auction, parties to the auction will have contractual rights to enforce any unexecuted obligations under the agreement. However, where a party has engaged misleading or deceptive conduct in trade or commerce, that party will also contravene *s 18 of the Australian Consumer Law (ACL)*. This article provides a basic definition of traditional auctions and online auctions, and also describes other forms of auctions that have been recognised by the law. This will be followed by an examination of some instances of misleading or deceptive in relation to online auctions, and a brief discussion of some of the ways in which a person may contravene *s 18 of the ACL* while using an online auction platform such as eBay. .... 93

**Increased Civil Pecuniary Penalties – The “Cost of Doing Business” or an Effective Deterrent?** – *Cam H Truong QC and Luisa F Alampi*

In this article, the authors look at the rise of the civil pecuniary penalty (CPP) as a tool for regulators. They examine how CPPs have been calculated in Australia with the community, regulators and businesses alike considering CPPs largely as the “cost of doing business” rather than a measurable and effective deterrent. The new statutory maximums under the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act 2001 (Cth)* will be discussed. The authors opine that regulators are likely to place less reliance on quantum “consent”, and will instead push the boundaries for higher CPPs to more effectively deter business misconduct. The article concludes by expressing caution in setting too high a CPP as untoward consequences may flow which would undermine the goal of CPPs as an effective deterrent. .... 101

**Why the Doctrine of Penalty Cannot Make Australian Unused and Expired Gift Cards Refundable?** – *Dr Wei Wen*

Gift cards are valid for a short period of time in Australia, but consumers cannot get refunds for the remaining monetary value in expired gift cards. The *Treasury Laws Amendment (Gift Cards) Act 2018 (Cth)* mandates gift cards to be valid for minimum three years (longer than they used to be) but does not mandate expired gift cards to be refundable. Given the huge amount of money spent on gift cards, it is necessary to explore a remedy that deals

with the no-refund problem. The author argues that the penalty doctrine, despite its prima facie relevance, cannot apply to strike down the non-refundable term both at law and in equity, because the no-refund term does not have the “terrorem” or “deterrent” nature. However, this exercise is desirable and necessary, because it points a clearer direction to the *Australian Consumer Law* which can give consumer more effective protection. .... 116

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