

TERMS OF TRADE

AN ESSENTIAL TOOL FOR BUSINESS

Lawyers are often approached by disgruntled business owners and dissatisfied customers to help resolve disputes. While the law helps in defining and clarifying certain aspects of the contractual relationship between the parties, the starting point will often be “what did the two parties intend and agree at the time the goods and/or services were purchased?”

One of the most useful ‘front end’ tools for businesses is having effective processes and procedures for engaging the client or customer. This is achieved through Terms of Trade, also known as Conditions of Sale.

WHAT ARE TERMS OF TRADE?

The purpose of the Terms of Trade (Terms) is to set out the essential conditions under which the parties will do business. Terms are designed to protect the rights of the business selling goods or providing services.

BENEFITS

Terms of Trade clarify the rights and obligations of the parties, and create certainty between the buyer and seller. Customers appreciate this clarity and certainty. This has a positive aspect in reducing the potential for misunderstandings and disputes to arise. A significant amount of time and money can be wasted in dealing with a dispute, not to mention the damage that can be done to the reputation of the business by a disgruntled customer. By adopting standard Terms a business can create consistency of arrangements across its customer base. This will help improve the efficiency of the business administration and help with debtor control. Terms can also be used to limit potential liabilities and provide some degree of security for recovery of debt following the supply of goods or services.

CUSTOMISING THE TERMS

There is no such thing as a standard approach for Terms. While all Terms should address key issues such as pricing and payment, it is essential that they be tailored to specific business activities. For example, Terms for businesses supplying goods will be different from Terms for businesses supplying services.

“The more the Terms can be tailored to the specific business, the more effective and useful they will be.”

WHAT SHOULD THE TERMS INCLUDE?

There are certain essential matters that should be addressed in any Terms, irrespective of the size or nature of the business. These include:

- **Definitions:**
All key terms should be defined including the parties to the Terms such as buyer and seller, and the goods and/or services covered by the terms of trade.
- **Quotations, orders and acceptance:**
Terms should contain clauses that deal with the method of placing orders, how quotes are dealt with and confirming that placement of an order constitutes a binding contract and acceptance of the Terms.
- **Price and payment terms:**
The Terms should contain clear and unambiguous statements about when and how payment is to be made, outline any arrangements regarding prompt payment discounts and the charging of interest on late payments. If required the Terms should also reserve the right to recover debt collection costs from the customer.
- **Guarantees, warranties and liabilities should be noted and addressed.**
Key consumer protection legislation in this instance is the Consumer Guarantees Act. The Act applies a number of statutory guarantees to the supply of goods and services of a kind ordinarily acquired for domestic use or consumption. Businesses need to be mindful of the requirements of this legislation and aware of what they are legally able to contract out of. Any contracting out would need to be done explicitly in the Terms of Trade. Where the business supplies goods there are a number of other important factors to be addressed including the following:
 - Delivery arrangements should be clearly stated and costs of delivery attributed to one of the parties.
 - Ownership of the goods
When ownership passes to the customer should be addressed particularly where goods are delivered prior to

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payment being made. The business is likely to want to ensure that ownership of the goods is retained until such time as payment in full is made. This would be particularly relevant when the cost of the goods to the business is significant. The business may even wish to go a step further and take a registered charge over the goods until payment is made. Once again, taking a charge should be considered where the cost of the goods is significant and/or where the business perceives that there is a risk of non-payment. There is specific legislation that deals with the creation of these charges, known as 'Purchase Money Security Interests'. The Terms of Trade will need to be drafted with these legislative requirements in mind. The business will also need to have procedures in place surrounding the creation and handling of these charges.

- The passing of risk in the goods should be addressed. The Terms of Trade should state clearly the time at which risk passes ensuring that both parties are aware of the time at which they become responsible for insuring the goods.

DEALING WITH REGULAR CUSTOMERS

Some businesses have regular customers to whom they supply goods and/or services on a regular and on-going basis. It is not necessary to have separate Terms signed off for every transaction with that customer. In this situation the Terms can be modified to reflect that they apply to all transactions between the parties.

PERSONAL GUARANTEES FROM CORPORATE CUSTOMERS

Where the customer is a company, the business should consider obtaining guarantees from the directors and/or shareholders. Under the guarantee the directors will be personally liable for the debts incurred by the company.

"Small recently formed companies are unlikely to hold significant assets and the risks of non-payment are increased."

PRIVACY ACT AUTHORISATION

As part of robust credit management processes, the business may want to carry out credit checks on all its customers before agreeing to supply good/services. This becomes even more important when the transaction is significant. Conducting credit checks enables the business to assess the risk in doing business with that customer. Where the customer is a private individual the business must be authorised to undertake these checks by a specific Privacy Act authority.

CONCLUSION

If your business does not have Terms of Trade, or believes it's existing Terms need updating, start by reviewing this document. The preparation of Terms requires a significant degree of legal expertise. Where this expertise is not used there are real risks that the business may fall into one of the many pitfalls in this area.

Terms of Trade are a vital risk management tool; they facilitate effective interactions and positive experiences between the business and its customers leading to growth of the business.

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