

Legal Considerations When Establishing E-Commerce Services

Key terms of sale

✓ Statutory consumer guarantees

Under the Australian Consumer Law (ACL) consumers have the benefit of certain statutory guarantees, e.g. products must be of acceptable quality and services must be fit for the purpose or give the results that were agreed with the consumer.

You can't exclude statutory consumer guarantees in your Ts&Cs but you can include wording to limit your business' liability under these guarantees. This must be very carefully worded.

✓ Returns and refunds

Your Ts&Cs should detail when a customer can return goods to you and/or claim a refund for the supplied goods or services.

If you choose to offer a warranty against defects to consumers then the warranty must meet certain legal requirements set out in the ACL.

You must also include the following wording in the Ts&Cs:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

✓ Risk and title

Be clear in your Ts&Cs about when title and risk in the goods pass from you to the consumer.

Ensure that suitable insurance covers risks of loss and damage to the goods up until risk passes to the customer.

✓ Cancellation

Include in your Ts&Cs the circumstances in which a customer can cancel an order before it is fulfilled. Any cancellation fee should not exceed the costs you are likely to incur due to the cancellation.

✓ Limitation of liability

Your liability clause should expressly preserve the statutory consumer guarantees but subject to that, consider excluding any warranties not expressly stated, excluding liability for consequential loss and capping your potential liability.



But remember...



In many cases, such as when you sell to consumers, you can't include unfair contract terms in your Ts&Cs. To reduce risk of your limitation of liability clause being "unfair" you could include some carve-outs, e.g. the exclusions or limitations do not apply if you have been negligent.



If you are selling into overseas markets, your Ts&Cs also need to comply with relevant foreign laws.

Some of the key obligations imposed by the Australian Privacy Principles (APPs) under the Privacy Act 1988 (Cth)

- > You must take reasonable steps to implement practices and systems that ensure you comply with the APPs.
- > You must have a clearly expressed and up to date privacy policy.
- > You must give a privacy collection notice at or before the time of collecting personal information.
- > You must not use personal information for direct marketing (with some exceptions).
- > You must take reasonable steps to protect the personal information you hold from misuse and loss and from unauthorised access, modification or disclosure.

Privacy law compliance

When making sales to individuals you will need to collect their personal information, e.g. their name, address and credit card information. The Privacy Act is binding on "organisations", i.e. an individual, company, partnership, unincorporated association or trust that is not exempt from the Act.

• Civil penalties can be pursued by the Privacy Commissioner (up to \$1.8M for an organisation) where there is a serious or repeated interference with an individual's privacy. •

Website terms of use

Apart from the terms of sale, an e-commerce site will also usually include another set of terms - the website terms of use.

These terms cover generally include things like:

- a statement about ownership of intellectual property rights in the website content, and limits on what the user can do with that content;
- a limitation of the e-commerce seller's liability in relation to the accuracy of the website content;
- a governing law clause;
- a statement allowing the e-commerce seller to amend the terms from time to time; and
- a statement that by using the site, the user agrees to the terms.

Will my brand infringe third party rights?

Will my brand be registrable by me as a trade mark?



- ★ Get a thorough trade mark search done to check.
- ★ If you are using your trade mark to sell into other countries, consider the above two questions for those countries too.
- ★ You may be able to sell parallel imports in Australia without infringing any trade mark but be careful. Get specific legal advice about the products you wish to import and sell.

TIP

If you commission a third party to design a new logo for you, ensure you get a written assignment from them of the intellectual property rights, including copyright.

Using trade marks

Selling through a third party platform

If you sell through an established third party platform like eBay or Gumtree rather than setting up your own e-commerce site you may be able to tap into a large existing customer base.

But...

- ! You may find you are selling a "commodity" that many other vendors also sell and their prices may be lower than yours.
- ! You will probably need to pay fees to the platform operator.
- ! You may be contractually restricted from direct marketing to the customers.
- ! You must abide by the platform's Ts&Cs, e.g. refund policy.

If you'd like a copy of our detailed paper on this topic, get in touch!



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May 2017

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