

The small print.

Pulling Back the Curtain on Website Terms & Conditions

How many consumers really read the small print, also known as the terms and conditions, on a website? In truth, whether they are read or not, terms and conditions can have weight in the eyes of the law, so it's crucial to get them right. Here, Sharon Givoni shares her insights.



I know, I know, it's not the most exciting topic in the world, but read on to find out what you need to know when it comes to getting your website terms and conditions right.

The fact is consumers tend to rely on information found on websites to help them make a decision to buy a particular type of window furnishing, to find a match for a particular look for their home, or just to find the contact details to visit a brand's 'bricks and mortar' store.

However, what happens if the website contains inaccurate or outdated information and a customer relies on that information as part of their decision-making process? Is any potential damage limited to loss of reputation or sales? Is there more at stake?

Terms and Conditions

Terms and conditions are rules which a party must agree to abide by in order to use a service, such as when visiting a website. They are usually designed to protect a business from a variety of issues, but it is important that those terms and conditions comply with the law too.

We have all seen (and probably ignored!) the longwinded terms and conditions that often appear when using a website or other online service, which can be particularly challenging when they are heavily laden with words such as 'hereinbefore' and other 'legalese.'

These terms and conditions may appear as a separate webpage or as a single box to check, which most people simply check "I agree" without having read the text.

However, whether or not a consumer reads these terms and conditions, the consumer's acknowledgement or continued use of the site can bind the user to those terms.

As a business, the fact that a potential customer might not actually read all the fine print contained in the terms and conditions is no excuse for omitting them or failing to ensure that such terms are specifically tailored to the business' particular circumstances.

The Australian Consumer Law

The Australian Consumer Law is the national law for fair trading and consumer protection.

It identifies specific consumer guarantees that automatically apply to the purchase of most products and services. If a business sells a product or

service to a customer and that product or service fails to meet one or more of the consumer guarantees, the consumer has a right to repair, replacement or refund and/or compensation, depending on the circumstances.

From time to time the Australian Competition and Consumer Commission (ACCC) checks Australian websites and issues penalties to businesses with websites that do not comply with the provisions contained in the Australian Consumer Law. For example, if a business' website contains terms that conflict with this law, the business may end up with a fine. The ACCC has itself stated:

"Consumers are entitled to receive a refund, repair or replacement including when the goods purchased are faulty or do not match their description. Traders cannot impose terms and

conditions that exclude or waive these consumer guarantees under the Australian Consumer Law.”

For example, the law states that customers are generally entitled to return a product if they genuinely believe that there is a problem with it, regardless of whether the product is returned in its original packaging or whether the customer can provide the original receipt.

Websites that state policies in conflict with this can be in breach of the law. Why risk the fines or even worse, the adverse publicity that comes with such a breach?

Tip: The process of developing your business’s terms and conditions is not only a good time to reflect on your business practices for the purposes of ensuring that they comply with the Australian Consumer Law, but it can also be a good time to promote your business if it goes above and beyond the minimum requirements.

Customise the terms and conditions to suit your particular business

Your business is unique. Not only must the terms and conditions that appear on your business’ website comply with the law, they should also be uniquely tailored to the specific needs of your business.

Resist the temptation to simply cut and paste a set of terms and conditions from another business’ website. For example, terms and conditions for a business selling exotic fish in Europe are unlikely to be suitable for a window furnishing business in Australia. Products and services differ between businesses and laws are different in different jurisdictions.

In addition, ‘borrowing’ clauses from another business may confuse customers or conflict with Australian Consumer Law and other regulations that apply in your area. What’s more, copying from another site may also amount to copyright infringement. Engaging a lawyer to draft or review your website’s terms and conditions is generally the safest way to reduce this risk.

A checklist of items to include in your business’ website terms and conditions

Although every business is unique and has different requirements, a short list of items ordinarily included in terms and conditions appears below.

Tip: Create a checklist of the following items and review your website, noting down any potential issues you need to deal with. This will provide you with a basis to update your business’ terms and conditions, or highlight issues you may need to discuss with a lawyer to ensure your business is properly protected.

Business details

Generally, businesses are required to provide customers with certain details about the business.

Tip: Include the full trading name of your business, its ABN or ACN and a valid contact address in your terms and conditions.

Privacy policies

The Privacy Act 1988 outlines how some Australian businesses must handle, use and manage personal information.

Personal information is pretty broad and includes information such as an individual’s name, address and telephone number.

Although the law does not require every business to include a privacy policy, it is a good idea to include one anyway. After all, customers may provide their personal information to a website if they shop online or sign up to a mailing list – information they would want to ensure is kept confidential.

Tip: Put this information somewhere that is easy to find, such as on a quick access link or at the top of your terms and conditions. Customers need to be quickly assured that their information will be kept safe, without having to dig through piles of information.

Payment Process

Terms and conditions can also detail how your business will accept payment. Can customers pay online? What options for payment are available? Do you charge a fee for credit or PayPal payments?

Tip: By listing what payment methods your business accepts and any additional fees charged your business could avoid disputes with customers later on.

Delivery

How long will it take for an online purchase to be delivered to your customer? Does someone need to be present to sign for packages? Can a package be left at the address unattended?

Sorting out your delivery terms and outlining who acts as your delivery agent is essential in order to avoid disputes.

Intellectual Property and Social Media

Intellectual property rights are those rights given to people for things they have created, such as photos, text or content uploaded to a website. These rights generally give a creator exclusive rights over the use of his creation for a certain period of time. Copying another’s intellectual property without their permission may constitute infringement.

The existence of intellectual property rights may not be obvious to your customers or any third parties who access your website. It is better to make it clear what rights exist before any infringement occurs to avoid possible disputes.

Tip: You may want to allow another party to use an image you own in order to market your products, for example, on social media. However, you should maintain some level of control over the image to ensure social media is helping, not damaging, your business.

Use of hypertext links

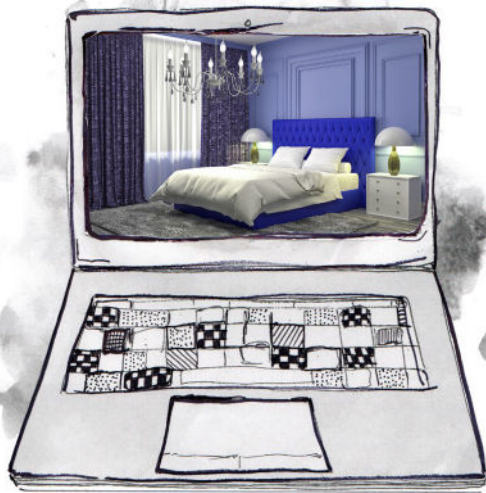
It is also recommended that your business makes it clear whether or not a link to your website is an authorised link and not one that will lead customers to a false website, or worse, a virus-prone website.

One way of signalling that the link to your website is safe is to allow a third party to make use of your mark for the sole purpose of providing a hyper text link to your website. If this is the case, you may need to include this authorisation in your terms and conditions to allow third parties to use your mark for this purpose.





Slight variations in colour photography or someone's screen settings can make a big difference to how your products look. Don't forget to warn people so its doesn't come back to bite.



Disclaimers

All computer screens are not created equally. The magenta on my screen may really look more like a rose pink on your screen.

You may want to include a disclaimer in your business's terms and conditions that explain that the presentation of information on your business's website is not intended to be the exact representation. Invite customers to come the store or acknowledge that the colours may vary from what is shown to ensure that customers are not misled into thinking they are seeing the exact colour of the item on their computer screen.

Tip: Provide customers with the option and means to obtain accurate and up-to-date information. Remember to include your contact details for customers to get in touch with you if needed.

Conclusion

Your terms and conditions are living documents and to be meaningful need to be updated as your business changes over time.

When was the last time you took a good look at your own website terms? Are they easy to understand? Do they explain what you're doing and do you know if they comply with the law?

Remember that no two businesses are alike, and the terms and conditions contained on your website will no doubt need to address a number of factors specific to your business. Make sure when drafting the terms and conditions to seek a second opinion and legal advice so that the terms correspond to those required for your window furnishings business – and not exotic fish!

About the Author



Sharon Givoni (link to www.sharongivoni.com.au) is a Melbourne-based intellectual property lawyer with clients in the window furnishings industry. She does trade mark

and designs work and provides contracts and copyright advice. Sharon's book *Owning It: A Creative's Guide to Copyright, Contracts and the Law*, available through Creative Minds Publishing (link to www.creativemindshq.com/owningit), aims to demystify the law for creatives and small business owners regarding the protection of their designs, trade marks, copyright, reputation and confidential information.