

Brand Protection + Intellectual Property Fact Sheet

Ten essential legal issues to consider for all e-commerce websites

There are a number of important legal issues to consider before your new e-commerce website goes live. The following checklist, while not an exhaustive list, includes ten of the most important.

General terms and conditions of use:

Every e-commerce website should contain general conditions of use which govern the manner in which the website is to be used and the specific obligations that a user must accept prior to using the website. General usage terms and conditions are different to terms and conditions applicable to online purchasing, and as such should be distinct and separate.

Your general terms and conditions of use should also be tailored to suit your particular business. Generic or copied terms will be useless for a website which has specific or unique policies, facilities or functions which are not precisely dealt with in the terms. Also by copying another website's terms without the proper consent you will be committing a breach of that website's or a third party's intellectual property rights.

Online purchasing terms and conditions:

Online purchasing terms and conditions should outline the various terms of the purchase agreement that must be agreed to by a buyer before a transaction can proceed via your website.

Contract law will apply to your online transactions. Your online purchasing terms and conditions should be drafted to ensure that a binding contract is created at a point in time that benefits you as the seller. They should also include provisions that limit your transaction risk and protect your business as much as possible. These may include limitations of liability, indemnities, an effective returns policy and setting a favourable legal jurisdiction.

Security:

You should implement adequate security measures on your website, both in relation to hardware and software, to protect confidential information of you and your users and ensure authentication and verification of parties to contracts. This can include measures such as the use of public key infrastructure to identify parties to contracts, the use of disclaimers in your terms and conditions and maintaining accurate electronic transaction records.

Privacy:

If you collect, use, store or disclose the personal information of users that access your website, you may be required to comply with the National Privacy Principles (NPPs) set out in the *Privacy Act 1998* (Cth).

The NPPs establish standards for the use of personal information. They also require you to explain your personal information collection and use practices to the people using your website at the time when you collect their information.

As such, you should have a privacy statement displayed on your website which sets out your policy for dealing with personal information and which incorporates the NPPs.

Trade Practices:

You should take care to ensure that any written content on your website does not breach the *Competition and Consumer Act 2010*.

You should ensure that a person using your website is not actually, or likely to be, misled or deceived by any material on your website. Therefore, if you make statements about products or services, they must be accurate. You may have sophisticated competitors monitoring your website, carefully searching for any slip-up in this regard.

This legislation also implies a series of warranties into every transaction that you enter into with consumers. These include warranties of good title, that goods are of a merchantable quality,

that goods are fit for the purpose for which they are bought and that due care and skill is used in providing services. These warranties cannot be excluded from your contracts. As such, you must honour them whether you include them in your terms or not.

Defamation:

You should take measures to ensure that your website does not display any defamatory material, or is linked to other sites that display defamatory material. If you allow other people to post material on your website or allow links to and from your website you should make careful use of disclaimers and indemnities in your terms of use to reduce the risk of you being sued for defamation.

Intellectual property protection and infringement:

You should ensure that all of your important written materials and documents, logos, brands, designs and technology materials have the appropriate copyright, trade mark, patent and design protection in the jurisdictions in which you do business (both in Australia and internationally).

You should also be aware of the intellectual property rights of others in respect of your website content. You should ensure that you have obtained adequate written permission to use any logos, photos, videos, graphics or other copyright materials on your website which you do not legally own.

Data storage and protection requirements:

You should be aware of any legal responsibilities you may have in relation to the electronic storage and protection of data. There are various laws which govern this issue, such as the *Electronic Transactions Act 1999*, which contains provisions relating to the requirement of signatures, production of documents and keeping of electronic records.

Spam:

You should ensure that any electronic messages you are sending to customers or prospective customers comply with the *Spam Act 2003* (Cth). Having an appropriate spam policy will greatly assist with compliance with these laws.

Ongoing consideration:

Consideration of the above issues should become an ongoing practice, not just a once off exercise. As your business evolves you should consider whether your terms and contracts should be updated, and whether your level of OP protection remains adequate. Further, the law in this area is constantly changing, therefore your policies and practices will need to be reviewed periodically to ensure that you are in compliance with the current legal requirements. You should ensure that your employees remain aware of your legal obligations through training and written procedural guides. Regular compliance audits may uncover a problem before it becomes very costly and time consuming to solve.

Hemming+Hart Lawyers can assist you with any concerns you may have regarding any of the issues in the checklist above or any other e-commerce legal issues confronting your business.

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