

Fineprint

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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,

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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 and when ownership passes to the customer should be addressed particularly where goods are delivered prior to 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 its existing Terms need updating, start the new year 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.

Farm Succession Planning

Early and proactive planning is the key

Farm succession planning has always posed some interesting challenges for the farming family, and their lawyers and accountants. The escalation of farm land values over recent years, which has not been reflected to a similar extent in farm incomes, means that it is increasingly difficult for the next generation to accumulate sufficient wealth to acquire the family farm.



In addressing the aim of succession to the family farm by their offspring, farming parents face competing considerations. These include the need to be financially supported in their retirement while, at the same time, ensuring that the successor (child) does not face such a debt burden making the farming business no longer viable. Future provision for the non-farming children in the family is another important consideration in the farm succession plan. These various and sometimes competing considerations and aspirations add to the challenge of instigating a farm succession plan.

Added to this financial and emotional mix are the often significant taxation issues which arise on implementing a farm succession plan. It is no wonder that families delay their planning or assign it to the 'too hard basket'. It also possibly explains the propensity for farmers to die with their boots on – it is easier to farm on than face the process of succession planning.

Inaction or insufficient action could mean that aspirations for the next generation continuing on the land may never eventuate.

Early and proactive planning is the key. Involvement by your lawyers and accountants is essential.

Don't die with your boots on

Once the family has decided on the future it wants for the farm, it is necessary to put in place the farm ownership structure that is most suited to achieve the family's succession aims. This might be a trust, a company, a partnership or, most likely in today's more sophisticated business climate, a combination of two or more. The best structure will depend upon the particular objectives and circumstances of the family. It is not the objective of this article to discuss the advantages and disadvantages of the various structures. In each case it will be necessary to consider the impact of estate planning, taxation and succession on the particular structure. It is definitely not a case of 'one size fits all'.

Farm succession planning is not a process which should be rushed. Your advisors will need to consider not only the taxation and GST implications of the plan, but also the possible creation of a forestry right, the financial arrangements which will involve negotiations with the bank and

re-documentation of securities and the transfer of farming shares which may have some timing issues.

In addition, careful attention must be paid to the implications of the Property (Relationships) Act 1976. Separate property should not be converted into relationship property, for example, and it could be necessary for the succession plan to include relationship property contracting out agreements.

These are all matters which take time to fully consider and investigate.

Tax issues

Apart from the obvious benefits of the farming parents being able to manage the succession process during their lifetimes, there are specific taxation consequences which could well arise if the succession process was only addressed by the farmer's Will.

Issue 32 of *Fineprint* contained an article entitled 'Tax Treatment of Deceased Estates: Planned Changes'. Some of these changes are now enacted (as Sub-Part FI of the Income Tax Act 2004) and came into effect on 1 October 2005.

Tax consequences arise¹ when assets such as livestock are transferred from the estate to the beneficiaries. The tax burden falling on the estate could upset the deceased's wishes to dispose of the residue of the estate to other family members. This is a further reason to plan your family's future sooner rather than later.

Succession planning should be an empowering exercise. If it seems too daunting to address it whilst seasonal farming demands are at their peak, at least as an interim measure talk with us to review your current Will in light of these tax changes. Start planning for succession now.

1. There is an exception if the assets transfer to the deceased's spouse or de facto partner.

Buying & Selling Property

Talk with your lawyer before you sign

Owning property is the desire of most New Zealanders, with the majority of households owning their own homes. This article explains the basic transaction process of buying and selling property, and why it is important to involve your lawyer from the outset.

Before signing the Agreement

For both vendors and purchasers, one of the most common mistakes they make is to sign the Agreement for Sale & Purchase without talking with their lawyer. Whether a real estate agent is involved or you are entering into an Agreement privately, it is important that your lawyer has the opportunity to read the Agreement, prior to you signing it. Once you sign it, you are bound by the conditions contained within it.

Let your lawyer know in advance that you are either selling or buying a property. Thus warned, they will be ready and waiting for you to call.

Although real estate agents prepare Agreements regularly, they may not draft special conditions as carefully as your lawyer would. For purchasers it is important to remember that the agent is acting for the vendor, and not for you. It is your lawyer who acts for you.

Your lawyer's role is to ensure the conditions in the Agreement are drafted in your best interests. The Certificate of Title will be checked to ensure that, amongst other things, access is guaranteed, easements are noted and explained, and the status of any restrictive covenants. You will also be advised on the best method of property ownership for your particular circumstances.

If you are under pressure to sign and, for whatever reason, are not able to get the Agreement to your lawyer before signing, make sure there is a 'Subject to Solicitor's Approval' clause.

Before signing, it is important that you read the entire Agreement carefully yourself, including the general terms. The real estate agent should also carefully explain the general terms and how they may impact on your transaction.

After signing

After the Agreement is signed you need

to work with your lawyer to satisfy any conditions in order to make the transaction unconditional. Purchasers may need to order a Land Information Memorandum (LIM) and confirm finance. Vendors may be required to complete specified work at the property.

Unconditional

Once the conditions are fulfilled, the Agreement becomes unconditional. Various documents must be signed. Purchasers will need to sign mortgage papers, and vendors must sign the transfer. Changes to this hard copy system are currently underway; these are covered below under 'E-dealing'.

Settlement

Your lawyer takes care of all settlement arrangements. All monies will pass between the trust accounts of the two lawyers involved. The vendor's lawyer is responsible for repaying your mortgage, and paying any outstanding rates and agent's commission from the sale proceeds. The local authority is advised of the change of ownership, and the real estate agent is notified that settlement has occurred and that the keys can be released to the purchaser. The necessary documentation is forwarded to the purchaser's lawyer to complete registration.

The purchaser's lawyer organises loan advances from the lender, obtains a guaranteed search of the title to make sure no encumbrances have been added since the Agreement was signed, and completes the settlement payment. After settlement the purchaser's lawyer will arrange for registration of all documentation. Both lawyers will send a settlement statement and reporting letter to their client.

E-dealing

All Certificates of Title are now held electronically. E-dealing allows your lawyer to register documents such as standard transfers, mortgages and discharges of



mortgages immediately following settlement. This removes the need for paper documents to be sent between lawyers and registration agents. It also means that the title is updated and transferred into the purchaser's name immediately on settlement, instead of two or three weeks later.

Rather than having to sign traditional transfers or mortgage documents, e-dealing vendors and purchasers now sign a client authority and instruction form (A & I form); photo and other robust identification may also need to be provided. This enables your lawyer to update the title on your behalf. E-dealing allows faxed copies of A & I forms to be acted on. Faxing can avoid costly delays if, for example, you are out of the country or in a different area to your lawyer, or if there are delays with the lender.

E-dealing is now becoming more popular as a cost-effective and efficient method of settlement. Not all lawyers e-deal, however it is likely that this system will become compulsory in the not too distant future.

Home buying and selling is a complex business. There is considerable value to both vendors and purchasers in talking with their lawyer before they sign the Agreement in order to get the best possible deal in the transaction.

Changing inter-generational attitudes to money

Help your children manage their money

Are there any teenagers out there who do not spend all their income and pocket money? If there are, they are certainly in the minority. However, this is hardly surprising if you look at it from their perspective. Why wouldn't you 'spend it up' when you are under constant pressure from friends and the consumer culture to keep up with all the trends?

Certainly financial concepts such as saving, risk management, diversification and long-term returns would hardly register when all you want is the latest cell phone or pair of shoes. This attitude to money is palpably different from a generation or two ago when working hard and saving for the future were of greater importance.

Why does it matter? Savings are something you have to learn about when you're young, or it just becomes a habit to spend everything and worry about tomorrow later.

So what are the practical steps that parents can take to help their children save more and manage their money better?

- 1. Practise what you preach** – unless you too are saving, it is very difficult to encourage your kids to put money away for a rainy day.
- 2. Encourage your children to open their own bank accounts** and investment funds early on. This gives them ownership of their own money.
- 3. Promote the idea of saving towards a goal.** For example, if a teenager could save \$100 a month from their earnings, this could grow to \$2,400 over a couple of years (which is enough to fund some university fees).
- 4. Do not let them have a credit card** until they have their own income and are responsible for their budgeting (maybe never!).
- 5. Praise them when they have done well financially** and perhaps even consider contributing \$1 for every \$2 they save.
- 6. Educate them** (and perhaps yourself) on their various investment options including shares, mutual funds and bank deposits.

This all sounds great in theory but the reality is most teenagers still won't be interested. However, the key is that you are actually doing something positive; often the greatest barrier to saving is excuses and inertia. Gains will not be made overnight, but slowly over a period of years.

The young person who moves into the workforce with an understanding of savings and investment will be far more likely to be able to come to grips with more complicated financial decisions such as paying off their loan, saving for a home and managing their financial affairs. It may be a hard sell, but don't forget that some day they may be supporting you in your old age.

Source: Strategi Limited



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Postscript

Maori incorporations

Organisations involved with Maori incorporations should be aware of the 2004 decision in *Bridgecorp Finance Limited v Proprietors of Matauri X Inc* (Court of Appeal, Wellington, 26 October 2004).

In 2001 the incorporation, through its management committee, mortgaged its land to raise funds to invest in a water bottling business. The shareholders subsequently voted by majority to support this decision. The venture failed and the financier tried to enforce its security.

The Court analysed the incorporation's powers from the time of its incorporation under the Maori Affairs Act 1953 until the time of the transaction when the Maori Land Act 1993 applied.

It held that because the Matauri X Incorporation was originally established with the standard statutory objects at the time of farming, forestry, mining, selling, leasing or alienating its land or doing any other thing related to the land in the order of the incorporation, and these original powers still applied. The borrowing therefore was not for any of its objects but for an extraneous purpose.

At the moment the financier cannot retrieve its money, but that is not the end of the matter. There will be separate court hearings about other aspects of the situation. One is the 'Indoor Management Rule' under which a person dealing with a company is entitled to assume that a company's internal requirements have been complied with and that the company's officers were acting lawfully. *Fineprint* will keep you posted.

Email scams

Some readers may have been the unfortunate recipients of scam emails originating from Nigeria, Benin and other countries. These emails offer deals and other riches to unsuspecting, naïve and perhaps greedy people.

Remember, if the benefit or return offered from the potential deal seems too good to be true, then it probably is. If in doubt, call us and we can help ascertain whether the email is a genuine offer or should be relegated to the recycle bin.

Holidays 2006

Public holidays for 2006, and up to 2008, can be found listed on the Department of Labour's website:
www.ers.dol.govt.nz/holidays_act_2003/dates/2006_9.html

State school term and holiday dates for primary, intermediate, secondary and composite schools can be found on: www.minedu.govt.nz, click on School Terms & Holidays at the top of the home page, and go from there.

Remember private and integrated school term dates may differ from those on the above site.

