

Terms of Trade – and how they help you get paid

What are terms of trade?

Terms of trade set out in writing the terms under which you agree to supply goods or services to your customers. When your customers agree to these terms a legal contract is formed which can be enforced through the courts.

Terms of trade deal with a number of important issues that you might not otherwise touch on with customers when you are talking to them about prices and quantities. For example, they might outline when payment is due, and the collection process available if payment is not forthcoming.

They give you – and your customers – more certainty, and can therefore increase your chances of getting paid. For that reason, terms of trade can be particularly useful for businesses that sell goods and services on credit.

What should terms of trade cover?

This will depend on the nature of your business, but they are likely to cover some or all of the issues listed below. Some sellers might only include four or five items from the list; others may need more comprehensive terms of trade.

Potential issues to deal with in your terms of trade:

- what is being sold
- the order process
- delivery and, where relevant, installation
- which party carries the risk of loss of the goods, and from when (which impacts on the parties' insurance requirements)
- how you will be paid and when
- your right to change the price of goods. (This may become important if you supply the customer over a long period of time)
- a process for varying terms other than price
- a right to freeze further supply in the event of non-payment
- a penalty charge for late payments, and how calculated
- warranties offered, including what repair work you will do
- any exclusions of liability
- a right to make credit checks on the customer. (For individual consumers this needs to take into account Privacy Act obligations)

- any right to enter the customer's premise to reclaim goods not paid for
- if you export, a clause stating which country's laws apply, and which court will deal with any dispute. This also applies if you sell goods overseas via the Internet, in which case your website will need an obvious link to your terms of trade
- lastly, and very importantly, where goods of high value or quantity are being sold, a retention of title clause.

What's a retention of title clause?

A retention of title clause (also called a reservation of title or Romalpa clause) spells out that the seller retains legal ownership of the goods until they are fully paid for. The clause sometimes also says that, if the goods are unsold by the customer, you are entitled to the proceeds.

In theory these clauses mean that if your customer goes bust before paying for your goods, they can't be taken by a liquidator or receiver and used to pay your customer's other debts. You will get them back. But in practice suppliers can run into difficulties if they:

- did not get customers to agree as a binding contract to the particular set of terms of trade containing the retention of title clause; and/or
- did not register the clause on the Personal Property Securities Register (PPSR).

These failures can be fatal if your customer has granted to the bank a general security agreement/debenture over all of the customer's property in the course of obtaining bank finance. If the bank has registered its competing security interest, it would have priority to yours.

Personal Property Securities Register

Registration on the Personal Property Securities Register is important.

The register was set up under the Personal Property Securities Act 1999, and enables you to register a financing statement in respect of the customer. The financing statement contains details about the debtor (customer), the collateral (personal property or goods subject to the security) and the secured party (the supplier, creditor or lender). The effect of registration is to give public notice that you have a security interest in the goods delivered to a customer on credit, and to establish a hierarchy of priority for competing security interests.

So, be warned, have customers sign agreement to the terms of trade and register your interests in goods on the PPSR using a financing statement. That way, hopefully, it will not be the receiver or liquidator who gets the goods ahead of you.

Using the register may not be practical for small volume or small value sales. But it is definitely crucial if you are dealing with a valuable and/or large order.

What are the limits on the usefulness of terms of trade?

There are limits on what you can do with terms of trade depending on whether your customers are other businesses, or consumers.

If your customers are consumers, then your terms of trade cannot over-ride protections provided in consumer legislation, such as the Consumer Guarantees Act and Privacy Act. However, if your customers are businesses, then they are covered by the Sales of Goods Act, and it is possible to contract out of this Act using your terms of trade. That means your terms of trade may need to be sophisticated enough to distinguish between customers who are businesses and those who are consumers.

Cost of enforcement is another limit on the usefulness of terms of trade. You may still have to go through the courts to get your money – though having terms of trade may speed up this process, and enable you to claim collection costs and penalty interest. However, terms of trade will not help if your customer is broke and has no money to pay you.

They may also be unsuitable for complex transactions, where you may need to get a tailor-made contract drawn up.

As already mentioned above, terms of trade will also be useless if they have not been agreed as binding contractual terms. It is important to introduce them correctly, and to retain evidence of that. Otherwise your customers may be able to claim that they never agreed to the terms.

How do I introduce my terms of trade properly?

Ideally, you should introduce your terms of trade before you start supplying the customer. Sending them on the back of the invoice may be too late.

Sometimes businesses worry that mentioning terms of trade might put off potential customers and undermine the chances of a sale. This concern should be weighed against the risk that you might win the business but not get paid.

One tactful way to introduce your terms of trade is to ask new customers buying on credit to fill in a brief credit application or new customer form. This form might include questions on who they are and where they're based, and will also include your terms of trade. Ask your customer to fill out and sign and return the form before you start supplying to them on credit.

Some businesses include their terms of trade on the back of their order forms, or on their website. Customers must sign the order form or click an icon to confirm they've read and accepted the terms of trade. Some service businesses email their terms of trade to customers, and ask the customer to email back confirming they've read and accepted the terms.

If your customer is a company, rather than an individual, make sure the person who accepts the terms of trade on the company's behalf is someone sufficiently senior.

Getting your terms of trade signed can greatly increase their enforceability, especially when you are selling to consumers rather than other businesses. That's because there are special steps you must take if you want a retention of title clause to be effective against a consumer.