
ONLINE CONTRACTS: HOW TO MAKE ECOMMERCE WORK

What is an online contract and how does it relate to e-commerce?

Electronic commerce (“e-commerce”) is defined in The Australian Guidelines for Electronic Commerce¹ as meaning:

“commercial activities carried out through electronic networks including the promotion, marketing, supply, order or delivery of goods or services”

E-commerce has the potential to offer both businesses and consumers greater efficiencies, cost savings and choices in transactions.

E-commerce is not limited to the internet. It includes all business transactions carried out through electronic means including Electronic Data Interchange transactions (“EDI”), teleshopping, pay television and m-commerce (using mobile phones and other mobile devices). Nevertheless, this paper is limited to issues arising out of contracts concluded through the internet (“online contracts”).

This paper does not deal with website development and hosting, computer contracts, intellectual property (including domain names and linking), digital signatures, security and authentication, online payments, smart cards, EFT transactions, online content regulation, online marketing (including spam), dispute resolution, privacy issues and the many other issues relating to the internet.

Categories of e-commerce

Electronic transactions may be concluded between various parties: businesses, consumers or government authorities. Depending on the parties participating in the transaction, e-commerce can be subdivided in four distinct categories:

Business to business transactions (“B2B”) involving performance for payment or performance in exchange for performance (for example when one party supplies statistical data in exchange for the results of market research).

Business to consumer transactions (“B2C”) involving the purchase of products by individuals outside their trade or profession.

Business to administration transactions involves commercial relations between companies and public bodies, for example following a government procurement contract.

¹ ‘The Australian Guidelines for Electronic Commerce’, Department of Treasury, March 2006

Consumer to administration transactions include social security payments and tax matters.

This paper deals with business to consumer transactions.

Types of electronic commerce

There are two types of electronic commerce: firstly, contracts for physical goods and services and, secondly, contracts for electronic materials (software, music, images, voice, text etc.).

This basic distinction leads to a further division of e-commerce contracts: in the first type, the internet is being used as the medium to communicate and sometimes to even conclude a contract, while in the second type the internet represents the place where the performance takes place.

WHAT ARE SOME OF THE ISSUES THAT YOU NEED TO CONSIDER WHEN PREPARING AN ONLINE CONTRACT?

Can you create an enforceable contract online?

It is not essential that a contract be in the traditional form of a written paper document with a handwritten signature for it to be enforceable. An online contract can be enforceable provided its terms can be proven and it is not for an illegal purpose. The law relating to paper contracts substantially applies to online contracts.

When is an online contract enforceable?

In order for a contract to be enforceable you must first prove the existence of the contract.

What evidence is needed to show there was a contract?

In the absence of a formal written contract, there can be a dispute as to the existence of an agreement or the exact terms of agreement.

The terms of the contract must be specific and clear. An agreement should state:

1. each party's obligations,
2. what payments must be made and when, and
3. precise details of the work that will be done or goods to be sold and when.

It is advisable to keep a copy of the contract for your records, whether it be stored electronically or in paper form.

How is an online contract formed?

In order to form a valid, binding contract, the following elements need to be established:

1. Offer
2. Acceptance
3. Intention to Create Legal Relations
4. Consideration

When is an order for goods or services an order?

When is an order placed? When it is received or when it is accepted? When it enters a computer network or when it is drawn to the attention of a particular person designated as the recipient?

This is important. If either the seller or the customer wish to withdraw from a deal it is necessary to establish whether it is binding as that will establish their rights. Is an order effective from the time an on screen order is made or when a receipt for the order is given? What if the seller's order clerk is on holidays and the email orders were not checked? What if there is insufficient stock and the customer was not warned about delays?

When is the contract formed?

Legal obligations are only incurred when a valid, binding contract is in existence. In order to determine whether a person has enforceable rights, it is necessary to be able to determine when the contract came into existence. This will be especially important if the contract contains cooling off periods or time limits.

Where is the contract formed?

This is important because this will determine where any legal action can be commenced. It is especially important in the digital environment when contracting parties may be in separate countries. In order to avoid any confusion, the contract should specify in which jurisdiction the contract is formed. For example, if an Australian company wishes to sell goods on the internet, it should make it clear that the laws of Australia and in particular, whichever state the company is based in, apply to the contract.

If you only wish to deal (or are only legally able to deal) with residents of a particular jurisdiction, you should say so. If you are promoting a "special offer" is it limited to Australian residents?

DO YOU KNOW WHO THE CUSTOMER IS AND WHY IS THIS IMPORTANT?

Why do I Need to Identify My Customer?

The best types of online contracts are those where the customer pays in advance (eg by credit card) or where you know your customer. If neither applies and you are extending credit to someone you do not know then enforceability is a critical issue.

Before a binding contract can exist, the identity of the contracting parties must be clearly ascertainable. You cannot enforce a contract against someone that does not exist or who is not capable of being bound by a contract (such as a child).

The entry into contracts online can be complicated by the issue of proving the identity of the parties. How do you know the person on the computer is the same as the person you intend to contract with? How can you be sure that that person is who the person says they are?

It is also essential to prevent a sender of a document from claiming the document wasn't sent by him or her. If a party can claim a document was sent by a person other than him or her, they can claim the legal defence of "non est factum" or "not my deed". If a person is successful in this defence, they will not be bound by the terms of the document.

Digital signatures make it possible to identify people over the internet. This makes contracting much easier. The use of digital certification will also mean that it will be possible to tell if a document has been tampered with. The Electronic Transactions Act accepts the legal validity of a digital signature.

Other methods of identification may include detailed personal information which can be confirmed or requiring the contracting party to print out a contract, sign it and send it to the other party.

Minors

Minors are generally unable to be bound by an agreement. Before entering into any formal arrangement, businesses should take care to determine whether or not the customer is over 18.

Businesses should not target advertising specifically at minors as they are able to escape liability under many contracts.

If it is thought that a customer is under 18, consent should be granted from the consumer's parents. Where this situation arises, it is best if the contract is entered into with the adult or, if the adult agrees, to have the adult guarantee the performance of obligations under the contract.

Selecting customers

Why is it important for you to select who your customers will be online?

Carefully selecting target groups for customers helps prevent the credit and identity problems referred to above.

Unless you restrict access by requiring a password, you cannot select who uses your site. You do not know where the users are.

If your product is only available in a certain jurisdiction you should say so or restrict access for transactions. Technology allows the personalisation of sites by using cookies.

CONTRACT CREATION

Offer/Invitation to treat : why is it important for you to know when there is an offer or invitation to treat?

Whether an offer has been made or an invitation to treat is fundamental to the issue of whether a contract has been formed or not and when it is formed. Acceptance of an offer results in the immediate formation of a contract provided there is an intention to create legal relations.

Conversely, what may appear to be acceptance will be regarded as an offer if the initial statement regarding the product is actually an invitation to treat. In the physical world, the display of goods on a store shelf is an invitation to treat. The offer is made when a customer takes them off the shelf and offers to pay for them. Acceptance is communicated when the shopkeeper accepts money in exchange for the goods. If the goods are mispriced the shopkeeper can refuse to sell them at the wrong price.

It therefore follows that in the online environment, advertising of goods, like goods displayed on a shelf, would be an invitation to treat. By ordering the goods, the customer would be making an offer to purchase them. If you accept the offer (eg by taking money or credit card details or by sending a formal acceptance letter/message) then the contract will be complete without further notice to you, subject to any specific contract terms covering errors or mispricing.

When is posting of information on a web site about goods or services, either an offer or an invitation to treat?

Two fundamental issues arise concerning advertising and marketing on the internet. Is it an ad or an offer? Normally, Home Page product descriptions and advertisements would be treated as invitations to treat rather than offers to enter into contract.

Does an email by a purchaser or clicking on an “I agree” button constitute an acceptance of an offer by the website owner or merely an offer to the website owner in response to the owner’s invitation to treat? It is the purchaser clicking on “I agree” who is actually making the offer.

Over the internet customers can obtain for themselves precise information as to available products and can customise them and simulate their performance. This shows what is available, although it comes very close to being actually an offer to the individual concerned for a specific product.

Errors or garbled offer

If a person does not receive an offer because of a technical error or the message is garbled, then they cannot accept it. It is important that confirmations be sent so there is no misunderstanding.

WRITING AND SIGNATURE REQUIREMENTS

How can a person enter a contract over the internet?

This can be done in a number of ways:

1. An exchange of email;
2. Click Wrap agreement via a website; or
3. By conduct, for example, a user downloading software from a website.

Intention to create legal relations

It is possible for a person to enter a contract without meaning to be bound by it. If this is the case, a valid contract may not exist as both parties must have an intention to create legal relations before a contract will be found to be in existence.

In a business context, there is a presumption that the parties intended to create legal relations.

It should also be possible to determine whether a document has been tampered with between the sender and the receiver. If a document has been tampered with then the terms contained in the document may not accurately represent the terms of the agreement intended between the parties.

A display message should be included in the ordering form/ transaction process, which clearly specifies that by completing the order, the customer is showing an intention to be legally bound by all the terms of the agreement set out on the website. The process should only be able to be completed by a person making deliberate decisions rather than clicking through a series of default screens.

You will also need to decide whether orders can be amended once they have been made. If you decide to allow orders to be amended this will be a variation to the terms of the contract.

Click Wrap Agreements

A click wrap agreement (the online version of the physical shrink-wrap agreement where you open the plastic shrink wrap and the contents are yours) is where a person can click on an icon labelled either “I agree” or “I accept” or “Submit” in order to enter into a legal relationship.

Click-wrap Agreements are now common on the internet. They are basically a process whereby a person must take an affirmative step to agree to a set of terms and conditions on which information may be used or good or services may be sold. The mere display of terms or links to those terms without the requirement for affirmation may lead to the conclusion that no contract was formed.

The terms and conditions in a click-wrap agreement should be disclosed to a potential customer before a transaction is completed. Arguments often arose with shrink-wrap agreements used by software companies because the terms and conditions of the licence agreement contained on paper sealed under the packaging were not disclosed to the consumer until after the software had been purchased and the package opened. Making clear disclosure of all terms and conditions prior to completion of a sale transaction will help to avoid such disputes in the online environment (provided those terms and conditions have been carefully drafted).

The terms and conditions in a click-wrap agreement must be clear, easy to read and easily to view. It is recommended that a consumer not be allowed to complete a transaction without being forced to view them. If the terms are not clear or obvious enough then it may be extremely difficult to establish the existence of an agreement to those terms.

Some websites include terms and conditions in the transaction process and require customers to click on a “next page” or “next” button to complete a transaction. An implication may be drawn from this that this is merely information being given to a customer and that there is no intention to create legal relations. In order to confirm the existence of an agreement, it is recommended that an “I accept” or “I agree” button be used instead. In this way, the consumer is forced to accept the terms and conditions before proceeding with a transaction. This implies a formal arrangement.

As well as the use of an “I agree” button, it is now good practice to give the option of selecting a “I do not agree” button, which should preferably be set as a default (eg highlighted or set as the default radio button or check box choice). This will prevent a customer trying to avoid obligations under the agreement claiming that he hit the “enter” button without meaning to or before reading the document carefully. Acceptance of the terms and conditions would not be possible in these circumstances without moving the cursor to the “I accept” button and clicking on it, thus showing an intention to accept the

terms and conditions. Current best practice is that the user is forced to manually scroll down from the beginning of the agreement to the bottom where the “I agree/do not agree” buttons are placed.

Downloading of a product should not be allowed without direct agreement to the terms, particularly jurisdiction, dispute resolution and warranties.

Additionally, pre-access registration could be imposed so that a buyer cannot bypass the “accept terms and conditions” screen.

Be careful though that the click-through process you use is not patented. (amazon.com has patented its “one-click” ordering process).

Consideration

Consideration is the exchange of value between parties. Consideration is required for a contract to be binding. Where there is payment in exchange for goods or services, there is usually sufficient consideration. The existence of consideration is less clear where there are affiliate schemes or loyalty points involved.

Digital signatures

It is important to distinguish a true digital signature using secure cryptographic methods such as Public Key Infrastructure or XML code from an “electronic” signature which merely comprises a typed name in the signature block or pasting in a scanned version of the signer’s signature.

Electronic Transactions Act 1999 (Commonwealth)

The Electronic Transactions Act 1999 (Cth) and corresponding state and territory acts aim to remove legal impediments to electronic contracts. References in this paper to the Commonwealth Act should be read as including a reference to the mirror legislation.

The Act is based upon the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce*.

The Act adopts the following principles:

- Functional equivalence - as far as possible, paper based commerce and electronic commerce should be treated equally by the law; and
- Technology neutrality - the law should not discriminate between different forms of technology.

The Act broadly works by not making electronic transactions invalid for the purposes of Commonwealth laws, simply because they are electronic.

ONLINE CONTRACT TERMS

Express, implied and mandatory terms

Whilst the law implies certain terms into every contract, it would be dangerous not to stipulate specific conditions for an online contract.

A clear description of the product/service on offer is essential. This description should be as accurate as possible. If there are particular uses for which the product is not suitable then these should be made clear to the customer. The goods must be fit for the purpose for which they are advertised. If a picture of the product is made available on the internet site then it should be a true representation of the product. A failure to properly describe the product may be a breach of the Trade Practices Act or the Sale of Goods Act and will most likely lead to the customer being dissatisfied and attempting to return the goods.

Any terms or conditions of use or product requirements (eg where you are selling computer software any required supporting hardware or software applications should be disclosed to the consumer) should be disclosed to the consumer.

If a product being sold is the subject of a licence agreement, then the consumer should be forced to review the licence agreement and expressly accept it before being allowed to purchase the product.

You must provide the consumer with adequate opportunities to reject the terms of the agreement and cancel or terminate the transaction.

You should also set out clearly your policy on exchanges and returns, including which party bears the packaging, delivery, postage, insurance and other expenses and who pays taxes and any currency conversion charges. Who pays for delivery of returns?

Specify the payment and delivery terms. You must disclose if orders are subject to availability, are subject to delivery timetables, are not available in certain jurisdictions or are not complete until full payment has been processed.

It will be necessary to establish whether or not the other side can cancel an order once it has been placed. This should be included as a term of the agreement.

Terms must be legible and without distractions such as flashing animations or complicated backgrounds.

Limitations of liability/warranty

Depending on the type of product being sold, it may be appropriate to impose terms on the use of the product or limit the seller's liability. This is because, online sales raise different issues from offline sales of certain products, especially software.

If the site provides advice or business information, any qualifications must be prominently displayed.

The potential customer must be forced to view these limitations of liability. A hyperlink to a separate page or an icon that can be clicked on to take you to the limitations of liability may not be sufficient. Before the contract can be finalised it must be necessary for the customer to view all the terms, conditions and warranties relevant to the particular products they are ordering.

After perusal of all terms and conditions there should be an option to enable the customer to terminate the transaction if they choose to do so.

Applicable law/jurisdiction

Why it is important to decide which law applies to an online contract?

The basis of a court exercising jurisdiction can be either the location of a party or the cause of action. A foreign body corporate carrying on e-commerce in a place could be held to be carrying on business there and subject to the local court's jurisdiction even if it did not have a physical office there.

In relation to a contract dispute, where is the contract formed? Where the consumer clicked the button or where the supplier receives the message that the button has been clicked?

Ideally, a vendor or supplier should nominate its home jurisdiction as it will generally be easier for it to commence an action to recover money or enforce its rights in its own jurisdiction. However, if for example, its home jurisdiction did not allow electronic documents to be submitted as evidence, it may wish to choose another jurisdiction which allows this.

The place where the contract is formed is relatively simple where both customer and seller are in the same State. What if there is a seller in one country and a customer in another country, where is the contract formed? Is it the place of the seller or the customer or where the server is located?

Whether a contract is regulated by a particular jurisdiction may depend on the level of interactivity of the site in that jurisdiction. Courts have been less willing to exercise jurisdiction where the site is passive with just static web pages than where, for example, orders are taken, a phone number is provided and emails exchanged.

The place where the contract is formed will be directly relevant to how the contract is interpreted in the future.

Keep a Record

It may be necessary for a person trying to enforce their rights under an agreement to prove its existence. In the online environment this may be difficult as there is often no hard copy in existence and contract conditions may be altered over time.

In order to prove the existence of a contract and its terms and conditions on the date it was entered into, it is necessary to keep either an electronic record or a hard copy. A hard copy of the contract may also be made available for printing from the screen or sent by email to the purchaser as confirmation of an order or transaction.

An alternative to the sending of a hard copy may be the automatic date stamping and storage of an agreement when it is accepted. If a dispute ever arises, this contract could be retrieved from the storage database and used as evidence (most Evidence Acts in Australia allow the submission of documents in an electronic form).

Without some proof of the terms and conditions existing at the time the contract was entered into, it may be possible for a person attempting to avoid an obligation to claim that the online agreement had been modified since the time they entered into it and that a particular provision was not present at that time.

If an online agreement is modified in any way (assuming the original contract gave you the right to unilaterally change its terms), the changes should be highlighted and a notification message informing consumers of the change and date the change was implemented should be easily visible on the website. This will ensure that regular customers are aware that there are changes to the terms and conditions under which they had previously been transacting. If this is not adequately notified, regular customers may be able to claim that they were continuing with their transactions on the basis that the agreement had never changed.

CHECKLIST

1. Does my contract allow me to select who my customers will be?
2. Have I clearly set out in my contract when an offer is and offer and when an invitation to treat is an invitation to treat?
3. Have I made it clear in my contract when a customer enters into a contract with me, and what happens to orders once they are made?
4. Have I provided sufficient limitations of liability/warranty in relation to the provision of my goods or services to the customer?
5. If there is any dispute in relation to the contract, have I indicated the jurisdiction where I want it to be resolved?

6. Does the contract confirmation show:
 - The price (including GST);
 - The description of the goods or services;
 - When the goods will arrive;
 - Delivery method details and charges;
 - Terms of payment;
 - Any special conditions;
 - The customers name and contact details;
 - The seller's name and contact details.
7. Make sure all terms and conditions are legible, both on screen and in a printed version.
8. Notify the customer of any terms and conditions. Set them all out clearly and state that no arrangement will be entered into unless the terms and conditions are agreed upon. If the product is, for example, software, and there are any licensing requirements, the licence should be set out and the customer should be forced to read the licence and accept it before the goods can be ordered or downloaded.
9. Have the purchaser take some positive step to show acceptance of the terms/conditions/licence. This may be done by clicking on an "I Accept" button or by the sending of an email.
10. Allow the purchaser an opportunity to reject the terms of the agreement and terminate the transaction.
11. If you choose to do so, you may provide an opportunity for a purchaser to request variation of the terms of your agreement. If you decide to do this, a record of all negotiations and the final contract must be kept.
12. Is your website page legible and without distractions?
13. Do consumers need specialised software or hardware to trade with you?
14. Have you taken reasonable steps to ensure the goods and services you supply are accessible to people with a disability?
15. Is advertising material clearly identifiable, so it cannot be confused with other content?
16. Are procedures in place to ensure that any marketing messages you send do not constitute spam?
17. Have you taken reasonable steps to avoid entering into transactions with minors?

18. Can consumers easily find all key information about your business, including contact details?
 19. Have you taken appropriate steps to protect consumers' privacy?
 20. Have you provided consumers with payment mechanisms that are easy to use and offer appropriate security?
 21. Have you clearly explained to consumers the security and authentication methods you use so they can assess any risks?
 22. Do consumers have easy access to, and clear information about, dispute resolution procedures?
 23. Are consumers informed about any specific laws or jurisdiction applicable to transactions with your business?
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Disclaimer

This publication provides general information only. The information does not constitute legal advice and should not be relied on as such. Professional advice should be obtained about the application of any laws or regulations to your particular circumstances.

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